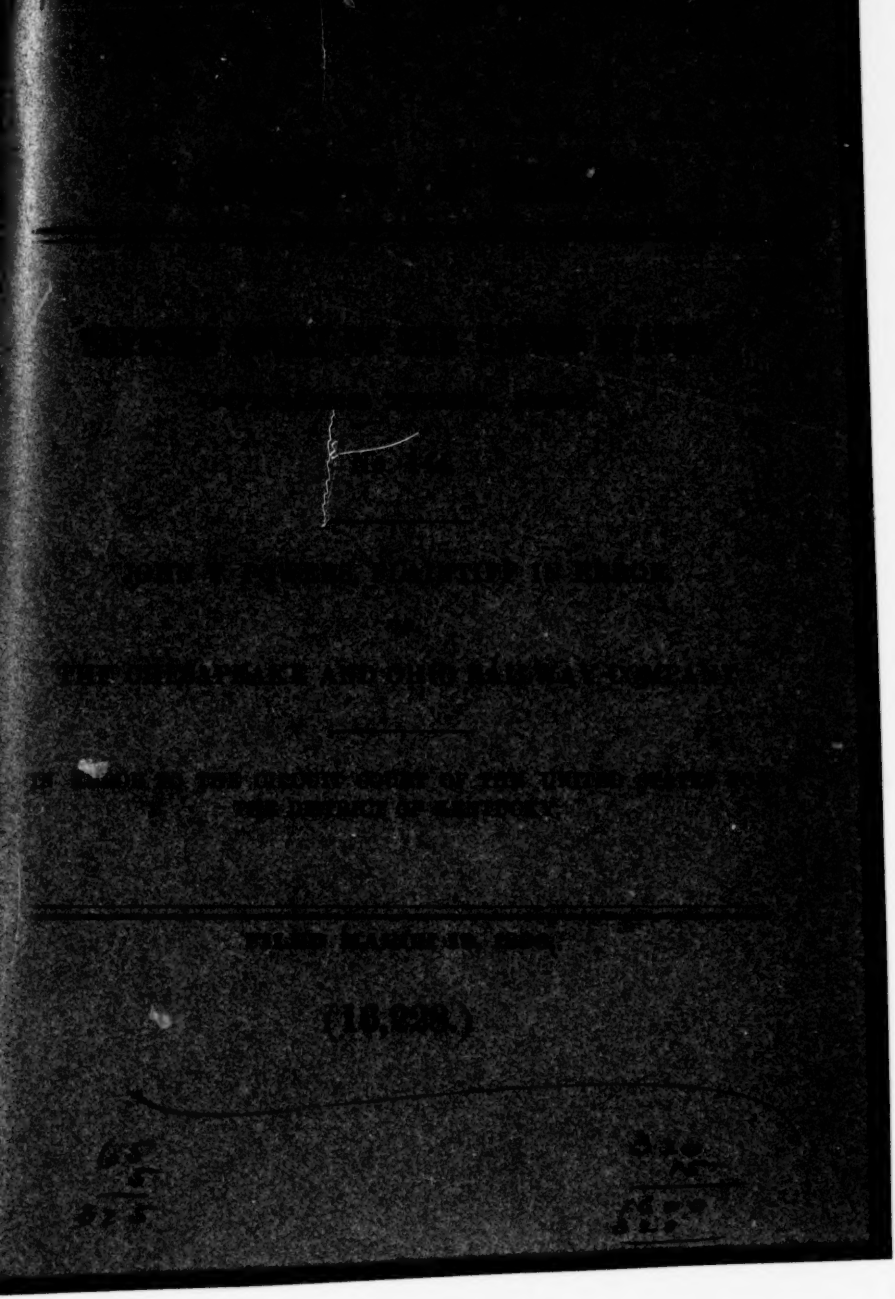


(16,228.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 144.

JOHN T. POWERS, PLAINTIFF IN ERROR,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 6, 1897.

1 UNITED STATES OF AMERICA,
District of Kentucky, at Covington.

At a regular term of the circuit court of the United States of America within and for the District of Kentucky (at Covington), in the sixth judicial circuit of the United States of America, begun and held at Federal Court hall, in said district, at Covington, on the first Monday in December, being also the second day of that month, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States of America the one hundred and twentieth.

Present: Hon. John W. Barr, sitting as circuit judge.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY, William D. Boyer, David Evans, and Edward Hickey, Defendants. } At Law.

2 Be it remembered that heretofore, to wit, on the 4th day of December, in the year of our Lord one thousand eight hundred and ninety-three, came the defendant The Chesapeake & Ohio Railway Company, by its attorneys, and in open court filed herein a certain transcript from the Kenton circuit court. Said transcript is clothed in words and figures following, to wit:

Pleas before the honorable the Kenton circuit court at the courthouse, in the city of Covington, on November 6, 1893.

Hon. Geo. G. Perkins, judge.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMpany, William D. Boyer, David Evans, and Edward Hickey, Defendants. } Ordinary. No. 924.

Be it remembered that on the 7th of September, 1893, the plaintiff filed the following petition:

Kenton Circuit Court, at Independence.

JOHN T. POWERS
against
THE CHESAPEAKE & OHIO RAILWAY COMPANY, William D. Boyer, David Evans, and Edward Hickey. } Petition.

3 The defendant The Chesapeake & Ohio Railway Company is and at the times hereinafter stated was a corporation operating a railroad in the counties of Kenton and Campbell, in the

Commonwealth of Kentucky, with locomotive engines, cars, and other appurtenances thereunto belonging.

The defendants Boyer, Evans, and Hickey reside in Kenton county. On the 19th of November, 1891, plaintiff was the servant of the corporate defendant, employed by it as a switchman, and one of the crew of the defendants' switching engine number twenty-two (22). On said day, and while he was so in the service of the corporate defendant in its railway yard, plaintiff was by said defendant ordered and directed to throw a switch of said defendant's said railway and to put a car on a side track of said defendant's said railway; and thereupon plaintiff did then and there, in said yard of the corporate defendant, enter upon the execution of said order and direction of said defendant, and while plaintiff was then and there in said yard of the corporate defendant at work executing said order and direction of said corporate defendant — of the defendants did with gross and wanton negligence run and operate locomotive engine of the corporate defendant and a tender and a caboose attached thereto against, upon, and over plaintiff, and thereby and by the gross and wanton negligence of all of the defendants plaintiff's right arm between the elbow and wrist was so crushed that the same was soon thereafter necessarily amputated, and he was otherwise
4 seriously and permanently injured in his person. Said injury was so inflicted upon plaintiff in the night-time, when it was very dark. Said locomotive engine, tender, and caboose were — and there by the defendants with gross and wanton negligence run and operated backwards with said tender in front of said locomotive engine and nearest to plaintiff and said caboose behind said locomotive engine. Defendants then and there with gross and wanton negligence had no sufficient light nor any light nor other warning signal on said tender, locomotive engine, or caboose. Defendants then and there with gross and wanton negligence gave no signal or warning of any kind of the moving or the approach towards the plaintiff of said tender, locomotive engine, or caboose, nor did they have any person nor were they or either of them on the lookout on said tender, locomotive engine, or caboose or so placed or stationed as to give any signal or warning whatever of the moving or approach of said tender, locomotive, or caboose. In the committing of the wrongs aforesaid the defendants Boyer, Evans, and Hickey were each and all the agents and servants of the defendant The Chesapeake & Ohio Railway Company, and at the time and place of the committing of said wrongs, as aforesaid, the defendants Boyer, Evans, and Hickey were, respectively, conductor, engineer, and foreman of said train composed of said locomotive engine, tender, and caboose, and as such they had possession, direction, and control of and ran and operated said locomotive engine, tender, and caboose and jointly committed the wrongs herein
5 complained of.

By said injuries plaintiff was made and long continued ill. He suffered and long will continue to suffer great physical pain and mental anguish. He lost much time. He is thereby made a helpless cripple, unable to work at his vocation or any other or to earn

a support, and was damaged in the sum of twenty-five thousand dollars, for which and for costs he prays judgment.

WM. GOBEL,
Att'y for Plaintiff.

At a sitting of said court on Oct. 14, 1893—

"The defendant files a petition and tenders a bond for a removal to the circuit court of the United States."

The said petition and bond are as follows:

Your petitioner, The Chesapeake & Ohio Railway Company, says that it is the defendant in the above suit; that the matter and amount in dispute in the above-entitled action, exclusive of interest and cost, exceed the sum or value of two thousand ($2,000) dollars; that the said suit is a civil action to recover the sum of twenty-five thousand ($25,000) dollars on account of injuries alleged to have been sustained by the plaintiff, John T. Powers, near Newport, on November 19, 1891, by reason of the gross and wanton negligence of defendant in running and operating its certain locomotive engine upon and over plaintiff.

That there is in said suit a controversy which is wholly
6 between citizens of different States, and which can be fully determined as between them, to wit, between your petitioner, The Chesapeake & Ohio Railway Company, defendant in the said suit, who avers that it was at the commencement of this suit and still is a corporation organized under the laws of the State of Virginia and West Virginia and of no other State, and that it was then and still is a citizen and resident of the States of Virginia and West Virginia and of no other State; that it was not then and is not now a resident and citizen of the State of Kentucky, and the plaintiff, John T. Powers, who was at the commencement of this suit and still is a resident and citizen of the State of Kentucky.

Your petitioner further says that the defendants Wm. D. Boyer, David Evans, and Edward Hickey are fraudulently and improperly joined as parties defendants for the sole purpose of defeating the right of the petitioner to remove to the United States circuit court, and your petitioner offers herewith a bond, with good and sufficient surety, conditioned according to law, for its entering in the circuit court of the United States for the district of Kentucky, on the first day of its next session, a copy of the record in this suit and paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto; and your petitioner prays this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept its surety and bond, and to
7 cause the record herein to be removed to the said circuit court of the United States for the district of Kentucky; and your petitioner will ever pray.

THE CHESAPEAKE & OHIO
RAILWAY COMPANY,
By HALLAM & MYERS AND
W. H. JACKSON, *Attorneys.*

Know all men by these presents that the Chesapeake & Ohio Railway Company, as principal, and Frank A. Prague, as surety, are held and firmly bound unto John T. Powers in the sum of two hundred dollars; for the payment of which, well and truly to be made, they thereby bind themselves firmly by these presents.

The condition of this bond is such that whereas the Chesapeake & Ohio Railway Company has petitioned for removal to the United States circuit court for the district of Kentucky of a certain suit now pending in the Kenton circuit court, at Independence, wherein John T. Powers is plaintiff and the said Chesapeake & Ohio Railway Company, William D. Boyer, David Evans, and Edward Hickey are defendants: Now, therefore, if said Chesapeake & Ohio Railway Company shall enter into the United States circuit court for the district of Kentucky, on the first day of its next session, a copy of the record in said suit and shall pay all costs that may be awarded by said court if said court shall hold that said suit was wrongfully or improperly removed thereto, then this bond shall be void; otherwise to remain in full force.

F. A. PRAGUE.

Witnesses:

— —.

8 — a circuit court on October 23rd, 1893—

"The motion to remove to the circuit court of the United States is submitted."

At a sitting of said court on November 6, 1893—

"The plaintiff objects to the motion to remove. The bond for removal is approved, and the plaintiff excepts."

Kenton Circuit Court.

I, H. C. Hallam, clerk of said court, certify that this and the preceding 5 pages contain a complete and true transcript of the record named in the caption.

Witness my hand this 1st day of December, 1893.

H. C. HALLAM, *Clerk.*

And on a day following, to wit, on December 14th, 1893, plaintiff, John T. Powers, by his attorney, came and filed answer to petition for removal, same being clothed in words and figures following, to wit:

In the Circuit Court of the United States for the District of Kentucky, at Covington.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY and Others, Defendants.

9 For answer to the petition for removal herein filed by the defendant The Chesapeake & Ohio Railway Company, plain-

tiff denies that there is in this suit a controversy which is wholly between citizens of different States, or a controversy which can be fully determined as between them, said alleged citizens of different States. He denies that the defendants Wm. D. Boyer, David Evans, and Edward Hickey or any of them were fraudulently or improperly joined as parties defendant herein or for the purpose of defeating the pretended right of removal of defendant The Chesapeake & Ohio Railway Company to the United States circuit court.

WM. GOEBEL,
Attorney for Plaintiff.

And on the same day, to wit, on December 14th, 1893, plaintiff came, by his attorney, and by leave of court filed amendment to transcript. Said amendment to transcript is clothed in words and figures following, to wit:

Kenton Circuit Court, Kentucky.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY CO., WM. D. BOYER, DAVID EVANS, and EDWARD HICKEY, Defendants. } Ordinary. No. 924.

10 On September 7, 1893, the following summons issued herein:

The Commonwealth to the sheriff of Kenton county:

You are commanded to summon the Chesapeake & Ohio Railway Company, William D. Boyer, David Evans, and Edward Hickey to answer, in twenty days after the service hereof, in and for the next October session of the Kenton circuit court, at Independence, a petition in ordinary filed against them in said county by John T. Powers, and warn them that upon failing to answer the petition will be taken for confessed or they will be proceeded against for contempt; and you will make due return of this summons on said day.

Witness H. C. Hallam, clerk of said court, this 7th day of September, 1893.

H. C. HALLAM, *Clerk*,
By JOHN G. ELLIS, *D. C.*

On December 12, 1893, said summons was returned to the clerk's office of said court with the following returns thereon:

"Executed the within summons by delivering a true copy hereof to Charles F. Firth, freight agent of the Chesapeake & Ohio Railway Co., he being the highest officer found in my county, the 26th day of September, 1893.

THOS. P. WILSON, *S. K. C.*"

"Executed the within summons by delivering to the within-named Wm. D. Boyer and David Evans a true copy hereof, Edward Hickey being a non-resident and not found in my county.

THOS. P. WILSON, *S. K. C.*,
By THOS. DUNN, *D. S.*"

11 Kenton Circuit Court, Kentucky.

I, H. C. Hallam, clerk of said court, certify that this and the next preceding page contain a complete and true transcript of that portion of the record in the cause named in the caption, which shows the issue of the summons, the summons itself, and the return thereon.

Witness my hand this December 13, 1893.

H. C. HALLAM, *Clerk.*

And on a day following, to wit, on December 18th, 1893, an entry was made herein; said entry was and is in words and figures following, to wit:

JOHN T. POWERS
vs.
THE C. & O. R'Y Co. *et al.*

This cause coming on to be heard on the motion of plaintiff to remand, came the parties, by their respective counsel, and made argument to the court upon said motion; whereupon the court, not being fully advised, takes time and said motion is submitted.

And on a day following, to wit, on January 10th, 1894, an entry was made herein; said entry was and is in words and figures as follows, to wit:

12

JOHN T. POWERS
vs.
THE C. & O. R'Y Co. *et al.*

This cause coming on to be heard on the motion of plaintiff to remand same to the State court whence it was removed, the court, now being fully advised, files its written opinion sustaining said motion; and it is now ordered and adjudged that said case be, and same is, remanded, and the clerk of this court is directed to certify the proper record to the clerk of the Kenton circuit court, at Independence, Kentucky.

The opinion referred to in foregoing order was and is in words and figures as follows, to wit:

Circuit Court of the United States for the District of Kentucky, at Covington.

JOHN T. POWERS
vs.
CHESAPEAKE AND OHIO R'Y CO. *et als.*

The petition in the Kenton circuit court, at Independence, alleged that the plaintiff, a servant of the Chesapeake & Ohio Railway Company, was injured through the negligence of the railway company and of the codefendants of the railway company, Boyer,
13 Evans, and Hickey, who were agents and servants of the defendant The Chesapeake & Ohio Railway Company in committing the wrongs averred.

The Chesapeake & Ohio Railway Company has removed the case on the ground that it is a resident and citizen of Virginia and that the plaintiff is a resident and citizen of Kentucky. The codefendants of the Chesapeake & Ohio Railway Company are admitted to be residents and citizens of Kentucky. The petition for removal was based on the theory that there was a separable controversy between the plaintiff and the Chesapeake & Ohio R'y Co. from that between the plaintiff and the other defendants. I do not think this theory can be sustained. The cause of action is single. It is for an injury caused by the negligence of the defendant and its servants, and the plaintiff has, as he had the right to do, joined the principals and the agents as defendants and as joint tort-feasors. The mere fact that the railway company may have a different defense from that of the other defendants does not make the controversy separable. This has been decided over and over again by the Supreme Court of the United States and does not call for citations.

Motion to remand is granted.

WM. H. TAFT.

Jan. 10, 1894.

14 And on a day following, to wit, December 3, 1894, came the defendant The Chesapeake and Ohio Railway Co., by its attorney, and in open court filed transcript of proceedings had in the Kenton circuit court. Said transcript was and is in words and figures as follows, to wit:

Pleas before the Hon. Geo. G. Perkins, judge of the Kenton circuit court, at the court-house, in Independence, Ky., on the 20th day of October, 1894.

JOHN T. POWERS, Plaintiff,
against
THE CHESAPEAKE AND OHIO RAILWAY COMPANY, WILLIAM D. BOYER, DAVID EVANS, and EDWARD HICKEY, Defendants. } Ordinary. No. 924.

Be it remembered that on the 7th day of September, 1893, the plaintiff filed his petition herein, which is as follows, to wit:

Kenton Circuit Court, at Independence.

JOHN T. POWERS, Plaintiff,
against
THE CHESAPEAKE AND OHIO RAILWAY COMPANY, William D. Boyer, David Evans, and Edward Hickey, Defendants. } Petition. No. 924.

The defendant The Chesapeake and Ohio Railway Com-
15 pany is and at the times hereinafter stated was a corporation operating a railroad in the counties of Kenton and Campbell, in the Commonwealth of Kentucky, with locomotive engines, cars, and other appurtenances thereunto belonging. The defendants Boyer, Evans, and Hickey reside in Kenton county.

On the 19th day of November, 1891, plaintiff was the servant of the corporate defendant, employed by it as a switchman, and one of the crew of said defendant's switching engines numbered twenty-two (22).

On said day, and while he was so in the service of the corporate defendant in its railway yard, plaintiff was by said defendant ordered and directed to throw a switch of said defendant's said railway and to put a car on a side track of said defendant's said railway, and thereupon plaintiff did then and there in said yard of the corporate defendant enter upon the execution of said order and direction of said defendant, and while plaintiff was then and there in said yard of the corporate defendant at work executing said order and direction of said corporate defendant all of the defendants did with gross and wanton negligence run and operate locomotive engine of the corporate defendant and a tender and a caboose attached thereto against, upon, and over plaintiff, and thereby and by the gross and wanton negligence of all the defendants plaintiff's right arm between the elbow and the wrist
16 was so crushed that the same was soon thereafter necessarily amputated, and he was otherwise seriously and permanently injured in his person. Said injury was so inflicted upon plaintiff in the night-time when it was very dark.

Said locomotive engine, tender, and caboose were — and there by the defendants with gross and wanton negligence run and operated backwards, with said tender in front of said locomotive engine and nearest to plaintiff and said caboose behind said locomotive engine. Defendants then and there with gross and wanton negligence had no sufficient light nor other warning signal on said tender, locomotive engine, or caboose. Defendants then and there with gross and wanton negligence gave no signal or warning of any kind of the moving or the approach towards plaintiff of said tender, locomotive engine, or caboose, nor did they have any person nor were they or either of them on the lookout on said tender, locomotive engine, or caboose or so placed or stationed as to give any signal or warning whatever of the moving or approach of said tender, locomotive engine, or caboose. In the committing of the wrongs aforesaid the defendants Boyer, Evans, and Hickey were each and all the

agents and servants of the defendant The Chesapeake and Ohio Railway Company, and at the time and place of the committing of said wrongs as aforesaid the defendants Boyer, Evans, and Hickey were respectively conductor, engineer, and fireman of said train composed of said locomotive engine, tender, and caboose, and as such they had possession, direction, and control of and ran and operated said locomotive engine, tender, and caboose, and jointly committed the wrongs hereinbefore complained of.

17 By said injuries plaintiff was made and long continued ill. He suffer- and long will continue to suffer great physical pain and mental anguish. He lost much time. He is thereby made a helpless cripple, unable to work at his vocation or any other, or to earn a support, and was damaged in the sum of twenty-five thousand dollars; for which and for costs he prays judgment.

WM. GOEBEL,
Att'y for Plaintiff.

Whereupon the following summons issued, to wit:

The Commonwealth of Kentucky to the sheriff of Kenton county:

You are commanded to summons the Chesapeake and Ohio Railway Company, William D. Boyer, David Evans, and Edward Hickey to answer in twenty days after the service hereof in and for the next October session of the Kenton circuit court, at Independence, a petition in ordinary filed against them in said county by John T. Powers, and warn them that upon failing to answer the petition will be taken for confessed, or they will be proceeded against for contempt, and you will make due return of this summons on said day.

Witness H. C. Hallam, clerk of said court, this 7th day of September, 1893.

H. C. HALLAM, *Clerk*,
By JOHN G. ELLIS, *D. C.*

18 Which summons was returned by said sheriff as follows, viz:

Executed the within summons by delivering a true copy hereof to Charles F. Firth, freight agent of the Chesapeake and Ohio Railway Co., he being the highest officer found in my county, the 26th day of Sept., 1893.

THOS. P. WILSON, *S. K. C.*

Service served on me this 26th day of Sept., 1893.
CHAS. F. FIRTH, *Ag't.*

Executed the within summons by delivering to the within-named Wm. D. Boyer & David Evans a true copy, each hereof, Edward Hickey being a non-resident and not found in my county.

THOS. P. WILSON, *S. K. C.*,
By THOS. DUNN, *D. S.*

On the 14th day of October, 1893, the defendant The Chesapeake and Ohio Railway Company filed a petition and tendered a bond for the removal of this cause to the United States court.

Which petition for removal is as follows, viz:

Kenton Circuit Court, at Independence.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE AND OHIO RAILWAY Company, William D. Boyer, David
19 Evans, and Edward Hickey, Defendants.
} Petition for Removal.

Your petitioner, The Chesapeake and Ohio Railway Company, says that it is the defendant in the above suit; that the matter and amount in dispute in the above-entitled action, exclusive of interest and costs, exceed the sum or value of two thousand ($2,000) dollars; that the said suit is a civil action to recover the sum of twenty-five thousand ($25,000) dollars on account of injuries alleged to have been sustained by the plaintiff, John T. Powers, near Newport on November 19, 1891, by reason of the alleged gross and wanton negligence of defendant in running and operating its certain locomotive engine upon and over the plaintiff.

That there is in said suit a controversy which is wholly between citizens of different States and which can be fully determined as between them, to wit, between your petitioner, The Chesapeake & Ohio Railway Company, defendant in the said suit, who avers that it was at the commencement of this suit and still is a corporation organized under the laws of the State of Virginia and West Virginia and of no other State, and that it was then and still is a citizen and resident of the States of Virginia and West Virginia and of no other State; that it was not then and is not now a resident or citizen of the State of Kentucky, and the plaintiff, John T. Powers, who was at the commencement of this suit and still is a resident and citizen of the State of Kentucky.

Your petitioner further says that the said defendant-, Wm. D. Boyer, David Evans, and Edward Hickey, are fraudulently
20 and improperly joined as parties defendants for the sole purpose of defeating the right of petitioner to remove to the United States circuit court.

And your petitioner offers herewith a bond, with good and sufficient surety, conditioned according to law, for its entering in the circuit court of the United States for the district of Kentucky on the first day of its next session a copy of the record in this suit, and paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this honorable court to proceed no further herein, except to make the order of removal required by law and to accept its surety and bond and to cause the record herein

to be removed to the said circuit court of the United States for the district of Kentucky.

And your petitioner will ever pray.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
By HALLAM & MYERS,
W. H. JACKSON, *Attorneys.*

STATE OF KENTUCKY, }
County of Kenton. }

Charles F. Firth, being duly sworn, says that he is the agent of the Chesapeake & Ohio Railway Company, a corporation under the laws of the States of Virginia and West Virginia and
21 petitioner in the above-entitled cause; that he is duly authorized, and that the statements in the above petition for removal are true.

CHAS. F. FIRTH.

Sworn to before me and signed in my presence this 4th day of October, 1893.

J. M. MAHON,
N. P., Kenton Co., Ky.

And said bond is as follows, viz:

Kenton Circuit Court, at Independence.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE AND OHIO RAILWAY COMPANY, WILLIAM D. BOYER, DAVID EVANS, and EDWARD HICKEY, Defendants. } Bond.

Know all men by these presents that the Chesapeake & Ohio Railway Company, as principal, and Frank A. Prague, as surety, are held and firmly bound unto John T. Powers in the sum of two hundred dollars; for the payment of which, well and truly to be made, they hereby bind themselves firmly by these presents.

The condition of this bond is such that whereas the Chesapeake & Ohio Railway Company has petitioned for removal to the United States circuit court for the district of Kentucky of a certain suit now pending in the Kenton circuit court, at Independence,
22 wherein John T. Powers is plaintiff and the said Chesapeake & Ohio Railway Company, William D. Boyer, David Evans, and Edward Hickey are defendants: Now, therefore, if said Chesapeake & Ohio Railway Company shall enter into the United States circuit court for the district of Kentucky on the first day of its next session a copy of the record in said suit and shall pay all costs that may be awarded by said court if said court shall hold that said suit was wrongfully or improperly removed thereto, then bond shall be void; otherwise to remain in full force.

F. A. PRAGUE.

Witnesses:

——— ———.

On January *January* 12, 1894, a transcript of proceedings in the United States court was filed and is as follows:

Proceedings had in the circuit court of the United States for the sixth judicial circuit and district of Kentucky, begun and held at the Federal Court hall, in the city of Covington, on the 4th day of December, A. D. 1893, and of our Independence this 118th year.

Court met.

Present: Hon. John W. Barr, sitting as circuit judge.

Be it remembered that heretofore, to wit, on December 4th, A. D. 1893, the following order was entered herein, viz:

JOHN T. POWERS
vs.
C. & O. R'Y Co. *et al.* } 1864.

This day came W. H. Jackson, of counsel for the C. & O.
23 R'y Co., and in open court filed a transcript of the proceedings had herein in the Kenton circuit court, and on his motion it is ordered that this case be placed on the common-law side of the docket of this court for further proceedings therein.

On December 14th, A. D. 1893, the following order was entered herein, viz:

JOHN T. POWERS
vs.
THE C. & O. R'Y Co. *et al.* } 1864.

This day came the plaintiff, by Wm. Goebel, Esq., of counsel, and filed answer to the petition for removal of this cause to this court. Came again the plaintiff, by his said counsel, and by leave of court now files an amendment to the transcript filed herein by the defendant, it appearing that a part of the proceedings had herein in the State court were not incorporated in the original transcript.

The answer to the petition for removal referred to in the foregoing order is as follows, viz:

In the Circuit Court of the United States for the District of Kentucky, at Covington.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY CO. *et al.* } Answer to Petition for Removal.

24 For answer to the petition for removal herein filed by the defendant The Chesapeake & Ohio Railway Co., plaintiff denies that there is in this suit a controversy which is wholly between citizens of different States or a controversy which can be fully determined as between them, said alleged citizens of different States.

He denies that the defendants Wm. D. Boyer, David Evans, and Edward Hickey or any of them were fraudulently or improperly joined as parties defendants herein or for the purpose of defeating the pretended right of removal of defendant The Chesapeake & Ohio R'y Co. to the United States circuit court.

WM. GOEBEL,
Attorney for Plaintiff.

The amendment to transcript, &c., referred to in the above order is as follows, viz:

Kenton Circuit Court, Kentucky.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE & OHIO R'Y CO., WM. D. BOYER, DAVID EVANS, and EDWARD HICKEY, Defendants. } Ordinary. No. 924.

On September 7th, 1893, the following summons issued herein:

The Commonwealth of Kentucky to the sheriff of Kenton county:

You are commanded to summon the Chesapeake & Ohio
25 Railway Company, William D. Boyer, David Evans, and Edward Hickey to answer, in twenty days after the service hereof, in and for the next October session of the Kenton circuit court, at Independence, a petition in ordinary filed against them in said county by John T. Powers, and warn them that upon failing to answer the petition will be taken for confessed and they will be proceeded against for contempt; and you will make due return of this summons on said day.

Witness H. C. Hallam, clerk of said court, this 7th day of September, 1893.

H. C. HALLAM, *Clerk*,
By JOHN G. ELLIS, *D. C.*

On December 12th, 1893, said summons was returned to the clerk's office of said court with the following returns thereon:

Executed by delivering a true copy hereof to Charles F. Firth, freight agent of the Chesapeake & Ohio Railway Co., he being the highest officer found in my county, this 26th day of September, 1893.

THOS. P. WILSON, *S. K. C.*

Executed the within summons by delivering to the within-named Wm. D. Boyer and David Evans a true copy hereof, Edward Hickey being a non-resident and not found in my county.

THOS. P. WILSON, *S. K. C.*,
By THOMAS DUNN, *D. S.*

26 Kenton Circuit Court, Kentucky.

I, H. C. Hallam, clerk of said court, certify that this and the next preceding page contains a complete and true transcript of that part of the record in the said cause named in the caption which shows the issue of the summons, the summons itself, and the return thereon.

Witness my hand this December 13, 1893.

H. C. HALLAM, *Clerk.*

On December 18th, A. D. 1893, the following order was entered herein, viz:

J. T. POWERS
vs.
THE C. & O. R'Y Co. *et al.* } 1864.

This cause coming on to be heard on the motion of the plaintiff to remand, came the parties, by their respective counsel, and made argument to the court upon said motion. Whereupon the court, not being fully advised, takes time and said motion is submitted.

On January 10th, A. D. 1894, the following order was entered herein, viz.

J. T. POWERS
vs.
THE C. & O. R'Y Co. *et al.* } 1864.

27 This cause coming on to be heard on the motion of plaintiff to remand same to the State court from whence it was removed, the court, being now fully advised, files written opinion sustaining said motion, and it is now ordered and adjudged that said cause be, and same is, remanded and the clerk of this court is directed to certify the proper record to the clerk of the Kenton circuit court at Independence, Kentucky.

The opinion of the court referred to in the foregoing order is as follows, viz:

Circuit Court of the United States for the District of Kentucky, at Covington.

JOHN T. POWERS
vs.
CHESAPEAKE & OHIO RAILWAY CO. *et al.* }

The petition in the Kenton circuit court, at Independence, alleged that the plaintiff, a servant of the Chesapeake & Ohio Railway Co., was injured through the negligence of the railway company and of the codefendants of the railway company, Boyer, Evans, and Hickey, who were agents and servants of the Chesapeake & Ohio Railway Company in committing the wrongs averred.

The Chesapeake & Ohio Railway Co. has removed the case on the grounds that it is a resident and citizen of Virginia, and that the plaintiff is a resident and citizen of Kentucky.

28 The codefendant- of the Chesapeake & Ohio Railway Co. are admitted to be residents and citizens of Kentucky.

The petition for removal was based on the theory that there was a separable controversy between plaintiff and the Chesapeake & Ohio R'y Co. from that between the plaintiff and the other defendants. I do not think this theory can be sustained.. The cause of action is single. It is for an injury caused by the negligence of defendant and its servants, and the plaintiff has, as he had the right to do, joined the principals and the agents as defendants and as joint tort-feasors. The mere fact that the railway company may have a different defense from that of the other defendants does not make the controversy separable.

This has been decided over and over again by the Supreme Court of the United States and does not call for citations.

Motion to remand is granted.

January 10th, 1894.

WM. H. TAFT.

UNITED STATES OF AMERICA, }
District of Kentucky. }

I, Joseph C. Finnell, clerk of the United States circuit court for the sixth judicial district and circuit of Kentucky, at Covington, hereby certify that the foregoing is a true and perfect copy of the proceedings had in this court in the case set out in the caption hereto as the same now appears from the records and files of
29 said case in this office.

Witness my hand and the seal of said court, at Covington, this 11th day of January, A. D. 1894, and of our Independence the 118th year.

JOSEPH C. FINNELL, *Clerk*,
By F. D. COCHRAN, *D. C.*

On the 6th day of February, 1894, the Chesapeake and Ohio R'y Co. filed an answer herein, viz:

Kenton Circuit Court, at Independence.

JOHN T. POWERS, Plaintiff,
against
THE CHESAPEAKE & OHIO RAILWAY COMPANY, &c., &c., Defendants.

Answer of C. & O. R'y Co.

Defendant says that the petition does not state facts sufficient to constitute a cause of action against it.

2nd. The defendant The Chesapeake and Ohio Railway Company for answer denies that the plaintiff was by it ordered or directed to throw a switch of its railway or to put a car on a side track of this defendant's said railway, or that he did enter upon the execution of such order or direction, or that while at work executing such order or direction or at any time this defendant did with

gross and wanton or any negligence run or operate any locomotive engine, tender, or caboose against, upon, or over plaintiff, or that by the gross or wanton or any negligence of this defendant plaintiff was injured.

30 It denies that with gross or wanton or any negligence it had not sufficient light or signal warning on said tender, locomotive engine, or caboose. It denies that with gross or wanton or any negligence it gave no signal or warning of the moving or approach of said tender, locomotive engine, or caboose.

It denies that it did not have any person on the lookout or so placed or stationed to give signal or warning.

It denies that in the committing of the alleged wrongs its co-defendants were its agents or servants, but says that they were the fellow-servants of the plaintiff in this case.

3rd. For further answer this defendant says that the injuries complained of in the petition were caused by the contributing negligence of the plaintiff himself, in that he did not look or listen for the approach of any railway train at the time of the happening of said injuries, and but for such contributing negligence said injuries could not have occurred.

4th. This defendant says that the injuries complained of did not occur within one year before the bringing of this action, and it pleads and relies on the statutes of limitation in such cases made and provided.

Wherefore it prays to be dismissed with its costs.

HALLAM & MYERS,
Att'ys for Defendant.

31 THE STATE OF KENTUCKY, }
Kenton County. }

Charles F. Firth says he is freight agent of the defendant The Chesapeake & Ohio Railway Co. in this county, and that there is no other chief officer in Kenton county, and that the statements of the foregoing answer are true.

C. F. FIRTH.

Subscribed and sworn to before me by said Chas. F. Firth this 3rd day of February, 1894.

J. M. MAHON,
N. P., K. Co., Ky.

At a circuit court for said county begun and held in the court-house, in the town of Independence, on the 20th day of February, 1894, the following order was had herein, viz:

JOHN T. POWERS }
vs.
THE C. & O. R'Y CO., &c. }

This cause is continued.

And afterwards, again, at a circuit court held in the court-house aforesaid and on the 16th day of October, 1894, the following order was had therein, viz:

JOHN T. POWERS
vs.
THE CHESAPEAKE AND OHIO RAILWAY CO., &c.

32 On the motion of the plaintiff this cause is discontinued except as to the defendant The Chesapeake and Ohio Railway Company. The demurrer and the motion to transfer are each overruled and defendant excepts to each ruling. The plaintiff files a reply. The defendant files a petition and tenders a bond for a removal to the circuit court of the United States, and the plaintiff objects. The court declines to approve said bond, but not for lack of sufficiency thereof, and overrules said motion to remove, and defendant excepts. The defendant files an amended answer. By consent said amended answer is traversed of record. The following-named jurors are duly elected and sworn, viz., J. R. M. Ellis, T. J. Sellers, L. N. Hoffman, William M. Cain, John G. Hogriffe, James T. Culbertson, Charles Roth, J. B. Conner, W. H. Hoffman, J. R. Rouse, A. J. Stewart, and William McElroy. The defendant files a rejoinder. The jury hears the testimony produced by the parties and court adjourned till tomorrow at 9 o'clock a. m.

The petition for removal referred to in the above order is as follows, viz:

Kenton Circuit Court, at Independence.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY. } Petition for Removal.

Your petitioner, The Chesapeake & Ohio Railway Company, shows that it is the defendant in the above suit; that the matter
33 and amount in the above-entitled action, exclusive of interest and costs, exceed the sum of two thousand ($2,000) dollars; that the said suit is a civil action to recover the sum of —— dollars for personal injuries received by said John T. Powers, at Newport, Kentucky, on November 19, 1891, by being struck by an engine of the said Chesapeake & Ohio railway, resulting in his having his right arm cut off; that there is in said suit a controversy wholly between citizens of different States and which can be fully determined as between them, to wit, between your petitioner, The Chesapeake & Ohio Railway Company, the defendant in said suit, who says that it was at the commencement of this suit and still is a corporation organized under the laws of the States of Virginia and West Virginia and of no other State, and that it was then and still is a citizen and resident of the States of Virginia and West Virginia and of no other State; that it was not then and is not now either a resident or citizen of the State of Kentucky, and the plaintiff, John T. Powers, who was at the commencement of this suit and still is a resident and

citizen of the State of Kentucky. Your petitioner further says that in the bringing of this suit heretofore on the — day of ——, 189–, David Evans and Edward Hickey were fraudulently and improperly joined as parties defendant in the above-entitled cause for the purpose of defeating the right of your petitioner to remove this cause to the United States circuit court; that because of the joinder of said Evans and Hickey said cause was remanded to the State court.

Your petitioner says that the suit as to said Evans —
34 Hickey was, on the 16th day of October, 1894, dismissed.

That the said cause is now for the first time pending as *the* the said Chesapeake & Ohio Railway Company alone.

And your petitioner offers herewith a bond, with good and sufficient surety, conditioned according to law, for its entering in the circuit court of the United States for the district of Kentucky, being the proper district, on the first day of its next session, a copy of the record in this suit, and paying all costs that may be awarded by said circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto.

And your petitioner prays this honorable court to proceed no further herein except to make the order of removal required by law and to accept such surety and bond and to cause the record herein to be removed to the said circuit court of the United States for the district of Kentucky; and he will ever pray.

THE CHESAPEAKE & OHIO
RAILWAY COMPANY,
By HALLAM & MYERS,
W. H. JACKSON,
Att'ys for C. & O. R'y Co.

STATE OF KENTUCKY, }
County of Kenton. }

William H. Jackson, being duly sworn, says that he is the agent and attorney of the Chesapeake & Ohio Railway Company, a corporation under the laws of Virginia and West Virginia and
35 petitioner in the above-entitled cause, and that there is no executive or chief officer of said corporation within the county, and that he is duly authorized, and that the statements in the above petition for removal are true.

WILLIAM H. JACKSON.

Sworn to before me and signed in my presence this 16 day of October, 1894.

H. C. HALLAM, *Clerk.*

The bond referred to in the foregoing order is as follows, viz:

Kenton Circuit Court, at Independence.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE & OHIO R'Y CO. } Bond.

Know all men by these presents that the Chesapeake & Ohio R'y Co., as principal, and Harvey Myers, as surety, are held and firmly bound unto John T. Powers in the sum of five hundred dollars ($500); for the payment of which, well and truly to be made, they hereby bind themselves, their successors, heirs, &c., firmly by these presents.

The condition of this bond is such that whereas the Chesapeake & Ohio R'y Co. has petitioned to remove the above cause unto the U. S. circuit court for the district of Kentucky:

Now, therefore, if the said Chesapeake and Ohio R'y Co. shall file a correct transcript or cause the same to be filed in the said
36 U. S. circuit court for the district of Ky. on or before the first day of the next term thereof, and shall pay all costs if it shall be held that this was wrongfully or unlawfully removed, then this bond shall be void; otherwise to remain in full force and virtue of law.

HARVEY MYERS.

The reply referred to in the foregoing order is as follows, viz.:

Kenton Circuit Court, at Independence.

JOHN T. POWERS, Plaintiff,
against
THE CHESAPEAKE AND OHIO RAILWAY COMPANY, &C., Defendants. } Reply to Answer of C. & O. R'y Co.

For reply to the second paragraph of the answer of defendant The Chesapeake and Ohio Railway Company, plaintiff denies that the codefendants of defendant The Chesapeake and Ohio Railway Company, or any of them, were the fellow-servants of plaintiff.

For reply to the third paragraph of the answer of defendant The Chesapeake and Ohio Railway Company, plaintiff denies that his injuries or any of them were in any way or to any extent caused by the contributing negligence or any negligence of plaintiff, either in that he did not look or listen for the approach of railway train or otherwise. He denies that he did not look or listen for the approach of railway train before and at the time of the hap-
37 pening of his said injuries. He denies that but for his said alleged contributing negligence his said injuries could not or would not have occurred. He denies that he was in anywise or to any extent negligent, and denies that he in any way contributed to his said injuries or any of them.

For reply to the fourth paragraph of the answer of defendant The Chesapeake and Ohio Railway Company, plaintiff says that at

the time when he was injured, as in his petition set out, he was an infant, not having attained the age of twenty-one years; that he was born on the 8th day of September, 1871, and did not attain the age of twenty-one years until the 8th day of September, 1892, when the statute of limitations began to run against his cause of action herein sued on, and this action was begun on the 7th day of September, 1893, by the filing of his petition and having summons duly issued and served thereon within one year after the statute of limitations began to run against his said cause of action.

He prays as in his petition.

WM. GOEBEL,
For Plaintiff.

STATE OF KENTUCKY, }
Kenton County. }

The plaintiff, John T. Powers, says the statements contained in the foregoing reply are true.

Subscribed and sworn to before me by said John T. Powers this 16th day of October, 1894.

——— ———.

38 The amended answer referred to in the foregoing order is as follows, viz:

Kenton Circuit Court, at Independence.

JOHN T. POWERS, Plaintiff,
vs.
CHESAPEAKE AND OHIO R'Y CO., Defendant. } Amendment.

For amendment to the third paragraph of its answer, the defendant, objecting to the jurisdiction of the court, says that the plaintiff was guilty of such contributory concurrent negligence, but for which the injuries to him would not have occurred, in that he voluntarily and without order or direction of this defendant or any of its agents or officers and not in the performance of any duty voluntarily placed himself upon the track of the locomotive engine in the petition mentioned and directly in its way, and was thereby injured.

W. H. JACKSON,
HALLAM & MYERS,
Att'ys for Defendant.

STATE OF KENTUCKY, }
Kenton County. }

W. H. Jackson says he is attorney for the defendant, The C. & O. R'y Co., neither of whose chief officers are in Kenton county, and says the statements of the foregoing amended answer are true as he verily believes.

W. H. JACKSON.

39 Subscribed and sworn to before me by said Jackson this 16th October, 1894.

H. C. HALLAM, *Clerk.*

The rejoinder referred to in the foregoing order is as follows, viz:

Kenton Circuit Court.

JOHN T. POWERS, Plaintiff,
vs.
C. & O. R'Y Co., Defendant. } Rejoinder.

For rejoinder the defendant denies that the plaintiff was born September 8, 1871, and denies that he did not become of age until September 8, 1892, and prays as before.

JACKSON MYERS.

And afterwards, again at the same term of court and on the 17th day of October, 1894, the following order was had herein, viz:

JOHN T. POWERS
vs.
THE CHESAPEAKE & OHIO R'Y Co. } 924.

Came the parties and their attorneys and the same jury as of yesterday, who, after hearing argument of counsel and receiving instructions from the court, retired to their room and thence into court with the following verdict: "We, the jury, find for the plaintiff in the sum of ten thousand dollars ($10,000.00). W. H.
40 Hoffman, J. R. M. Ellis, Wm. M. Cain, J. R. Rouse, J. B. Conner, Ch. Roth, L. N. Hoffman, J. E. Culbertson, Wm. McElroy, A. J. Stewart, and J. G. Hogreefe." It is therefore adjudged by the court that the plaintiff recover of the defendant, The Chesapeake and Ohio Railway Company, the sum of ten thousand dollars ($10,000.00) and his costs herein expended.

The instructions given to the jury by the court are as follows:

1st. If the jury find from all the testimony in this cause that plaintiff Powers was, by the foreman of the crew of which he was a member, ordered to throw the switch and put on a side track the car in the testimony mentioned, and that plaintiff then and there did attempt to carry out said order, and if the jury find from all the testimony that while plaintiff was attempting to carry out said order, if such order was given and if he did attempt to carry out the same, he was struck and injured by the tender of locomotive engine number 56, in the testimony described; and if the jury further find from all the testimony that the servants of the defendant company in charge and control of said locomotive engine number 56 and the tender thereof then and there where plaintiff was injured negligently failed to display on said tender any warning signal light, and then and there negligently failed to ring the bell and blow the whistle of said locomotive engine number 56, and if the jury find from all the testimony that such failures, if such
41 failures there were, amounted to and were gross negligence, as hereafter defined in these instructions, and that plaintiff's injuries resulted therefrom, and if the jury find from all the testimony that up to the time he was injured and at the time and place

when and where he was injured plaintiff was himself in the exercise of ordinary care, as hereafter defined in these instructions, and if the jury find from the testimony that plaintiff was born on September 8th, 1871, then the jury must find for the plaintiff.

2nd. If the jury find for the plaintiff, the measure of his damages will be a reasonable compensation in money for his pain and suffering of body and mind, if any, for his loss of time, if any, and for the impairment of his power to earn money, if any, as the natural and proximate result of his injuries, in the testimony described, not exceeding twenty-five thousand dollars; and in estimating the amount of the damages the jury will, if they find for the plaintiff, take into consideration the age and situation of the plaintiff, his earning capacity and its probable duration.

3rd. If the jury shall find from the evidence that the defendant was negligent in operating its engine, and shall also find that plaintiff was himself negligent, and that said negligence of plaintiff amounted to and was a want of ordinary care under the circumstances, and that but for such negligence of plaintiff, if any there was, he would not have been injured, then the jury will find for the defendant.

42 4th. Gross negligence is the failure to exercise slight care.

5th. Ordinary care is such care as persons of ordinary care and caution ordinarily exercise in the same or similar business under the same or similar circumstances.

6th. The court instructs the jury that the burden of proof is upon the plaintiff to prove negligence in the operation of the engine which caused the injury to the plaintiff.

7th. The plaintiff, being a servant and employee of the defendant, accepted the ordinary risks, perils, and hazards of his employment; and unless the jury find that the defendant's servants in charge of the locomotive tender which struck plaintiff were guilty of gross negligence in its operation, they shall find for defendant.

8th. Nine members of the jury may find a verdict; but if less than the entire jury return a verdict, then all those members of the jury that join in the verdict must sign it.

The following are the instructions the court refused to present to the jury, viz:

9th. Gross negligence is such want of care as indicates a reckless or wanton disregard of the rights of others

10th. If the jury find that the defendant, its servants or agents, were guilty of gross negligence in the operation of its locomotive engine and tender in the proof described, but nevertheless find that such negligence was not the proximate cause of the injury to

43 · plaintiff, they should find for defendant.

11th. The jury are instructed that it was the duty of the plaintiff in working along by the side of the track of defendant, in such close proximity to it as to be liable to be struck by a passing train, to look carefully in both direction- for the approach of trains.

12th. It was the duty of plaintiff, if there was sufficient room between the two tracks of defendant at the place in the proof described,

to walk and keep his body in such place as that passing trains upon neither track would strike him.

13th. It was the duty of the plaintiff to avoid placing himself immediately in a position of danger; and if you find that he walked so near the track upon which the engine was approaching as to be in danger of a collision, and that there was ample room between the tracks without such danger, then the plaintiff was guilty of contributory negligence and cannot recover.

14th. If you find that there was ample opportunity for the plaintiff to alight on the side opposite from the track upon which the engine was approaching that caused the injury, then he was guilty of contributory negligence and cannot recover.

15. If the jury believe from the evidence there was sufficient room or space between the tracks of defendant at the place in the proof described for plaintiff to have safely passed without being struck by the train in the proof described, they shall find for the defendant.

44 And afterwards, at the same term of court and on the 19th day of October, 1894, the following order — had therein, viz:

JOHN T. POWERS
vs.
THE CHESAPEAKE AND OHIO R'Y CO. } 924.

The defendant, The Chesapeake and Ohio Railway Company, filed motion and grounds for a new trial.

The motion and grounds for a new trial referred to above are as follows, viz:

Kenton Circuit Court, at Independence.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Defendant. } Moti-n and Grounds for New Trial.

The defendant, The Chesapeake and Ohio Railway Company, move- the court for a new trial of this cause upon the following grounds, to wit:

1. The damages awarded by the verdict are excessive and appear to have been given under the influence of passion and prejudice.

2. The damages were excessive and were given by the jury under the influence of passion and prejudice.

3. The verdict is not sustained by sufficient evidence.

4. The verdict is contrary to law.

45 5. The verdict is not sustained by the evidence and is contrary to the law.

6. The court erred in refusing to accept the defendant's petition for removal of this cause to the circuit court of the United States and approve its bond and proceed no further herein.

7. The court erred in proceeding with the trial of this cause after the tender of the petition and bond for removal of the same to the circuit court of the United States for the district of Kentucky.

8. Because the court had no jurisdiction to proceed with, try, hear, or determine this cause after the tender of the said petition and bond.

9. The court erred in overruling the defendant's motion to peremptorily instruct the jury to find a verdict for it upon the conclusion of plaintiff's testimony.

10. The court erred in admitting testimony of the plaintiff objected to at the time it was offered.

11. The court erred in admitting testimony on behalf of plaintiff of the witness Sullivan, which was objected to at the time it was offered.

12. The court erred in admitting testimony of the witnee- Buckley on cross-examination, which testimony was objected to at the time it was offered.

13. The court erred in admitting the testimony of the witness McKnaib, which was objected to by the defendant at the time.

14. The court erred in giving instruction number 1 offered
46 by plaintiff.

15. The court erred in giving instruction number 2 offered by the plaintiff.

16. The court erred in giving instruction number 3 offered by plaintiff.

17. The court erred in giving instruction number 4 offered by plaintiff.

18. The court erred in giving instruction number 5 offered by plaintiff.

19. The court erred in refusing to give instruction number 9 offered by defendant.

20. The court erred in refusing to give instruction number 10 offered by defendant.

21. The court erred in refusing to give instruction number 11 offered by defendant.

22. The court erred in refusing to give instruction number 12 offered by defendant.

23. The court erred in refusing to give instruction number 13 offered by defendant.

24. The court erred in refusing to give instruction number 14 offered by defendant.

25. The court erred in refusing to give instruction number 15 offered by defendent.

26. The court erred in refusing to instruct the jury to find a verdict for it at the conclusion of all the testimony.

W. H. JACKSON,
HALLAM & MYERS,
Att'ys for Defendant.

47 27. The court erred in permitting the plaintiff to testify to any rule of the defendant concerning the operation of its trains.

28. The court erred in permitting the plaintiff to testify what disposition was made of him after the injury.

29. The court erred in permitting the plaintiff to testify what time he had lost by reason of the injury.

30. The court erred in permitting the witness Chas. Sullivan to testify as to conversations between him and plaintiff prior to the accident.

JACKSON,
HALLAM & MYERS,
Att'ys for Defendant.

And afterwards, at the same court and on the 20th of October, 1894, the following order was had herein, viz:

JOHN T. POWERS
vs.
THE CHESAPEAKE & OHIO RAILWAY CO. } 924.

The motion and grounds for a new trial herein are overruled, and defendant, The Chesapeake and Ohio Railway Company, excepts and prays an appeal to the court of appeals, which is granted.

Thereupon the defendant gave the following supersedeas bond, viz:

48 Kenton Circuit Court.

JOHN T. POWERS, Plaintiff,
vs.
C. & O. R'W'Y Co., &c., Defendant. }

We undertake that the defendant The Chesapeake & Ohio Railway Company will pay to the plaintiff all costs and damages that shall be adjudged against said defendant on the appeal from the judgment of said court, rendered October 20, 1894, for $10,000.00, and interest and costs; also that said defendant will satisfy and perform the said judgment appealed from, if affirmed, and any judgment or order which the appellate court may render or order to be rendered by the inferior court not exceeding in amount or value the said judgment appealed from.

Witness our hands this 30th day of October, 1894.

F. A. PRAGUE.

Attest: H. C. HALLAM, *Clerk*,
By H. K. CONNELLY, *D. C.*

STATE OF KENTUCKY:

Kenton Circuit Court, at Independence.

I, H. C. Hallam, clerk of said court, do certify that this and the foregoing 46 pages contain a true and complete transcript of the record and proceedings had in this court in the case set out in the

caption hereto as the same now appears from the records and
49 files of said cause in this office, except subpœnas issued herein.
Witness H. C. Hallam, clerk of said court, this 30th November, 1894.

H. C. HALLAM, *Clerk*,
By JOHN G. ELLIS, *D. C.*

50 And on a day following, to wit, on December 6th, 1894, certain affidavits were filed, said affidavits being in words and figures as follows, to wit:

United States Circuit Court for the District of Kentucky.

JOHN T. POWERS
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY.

STATE OF KENTUCKY, *County of Kenton*, } *sct:*

William D. Boyer, being by me first duly sworn, says that he is the same William D. Boyer who was joined as a defendant in the suit of John T. Powers *vs.* The Chesapeake and Ohio Railway Company, William D. Boyer, David Evans, and Edward Hickey in the Kenton circuit court, at Independence, Kentucky. Affiant says that at the October term of said Kenton circuit court, at Independence, the said suit was discontinued as to him, the said William D. Boyer, and as to said David Evans and Edward Hickey; and affiant further says that said discontinuance as to him was made by plaintiff's attorney and without any request having been made by this affiant and without any knowledge on his part; and affiant further says that the discontinuance as to him was wholly without consideration
of any kind; that he did not pay or agree to pay to the said
51 plaintiff or his attorney anything whatsoever for the discontinuance of said case; that said discontinuance was wholly without consideration and without his request or knowledge.
And further affiant saith not.

WILLIAM D. BOYER.

Subscribed in my presence and sworn to before me this 30th day of November, 1894.

JOEL BAKER,
Notary Public, Kenton Co., Ky.

United States Circuit Court for the District of Kentucky.

JOHN T. POWERS
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY.

STATE OF KENTUCKY, *County of Mason*, } *sct:*

David Evans, being by me first duly sworn, says that he is the same David Evans who was joined as a defendant in the suit of

John T. Powers *vs.* The Chesapeake & Ohio Railway Company, William D. Boyer, David T. Evans, and Edward Hickey in the Kenton circuit court, at Independence, Kentucky.

Affiant says that at the October term of said Kenton circuit court, at Independence, the said suit was discontinued as to him, the said David Evans, and as to the said William D. Boyer and Edward Hickey; and affiant further says that said discontinuance as to him was made by plaintiff's attorney and without any request
52 having been made by this affiant and without any knowledge on his part; and affiant further says that said discontinuance as to him was wholly without consideration of any kind; that he did not pay or agree to pay to the said plaintiff or his attorney anything whatsoever for the discontinuance of said case; that said discontinuance was wholly without consideration and without his request or knowledge.

And further affiant saith not.

DAVID T. EVANS.

Subscribed and sworn to before me this 1st day of December, 1894, by David T. Evans.

FRANK P. O'DONNELL,
Notary Public for Mason County, Kentucky.

And on a day following, to wit, December 8th, 1894, came plaintiff, by his attorney, and filed certain motion herein; said motion was and is in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Kentucky, at Covington.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

53 Plaintiff moves this court to remand this cause to the State court because:

First. The cause was not removable under the statute governing the removal of cases from State to Federal courts.

Second. The petition and bond for removal were not filed within the time fixed by law for the filing thereof.

Third. The question sought now to be made by the second petition for removal has been heretofore adjudicated by this court, and said former adjudication is relied on in bar of this second removal proceeding.

WM. GOEBEL,
For Plaintiff.

And on the same day, to wit, on December 8th, 1894, an entry was made herein; said entry was and is in words and figures as follows, to wit:

JOHN T. POWERS
vs.
THE C. & O. R'Y CO.

This cause coming on to be heard on the motion to remand same to the State court, came the parties, by their attorneys, and made oral argument to the court; whereupon the court, not being fully advised of the judgment it is proper to render herein, takes
54 time. The plaintiff is given until Wednesday, December 12th, to file brief and said motion is submitted.

And on a day following, to wit, on December 11th, 1894, came plaintiff, by his attorney, and filed answer to petition for removal; said answer was and is in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Kentucky, at Covington.

JOHN T. POWERS
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY.

For answer to the removal petition herein plaintiff denies that the defendants Evans and Hickey or either of them were joined as parties defendant, either fraudulently or improperly or for the purpose of defeating the alleged right of removal of defendant, The Chesapeake & Ohio Railway Company.

WM. GOEBEL,
Att'y for Plaintiff.

55 And on a day following, to wit, on December 22, 1894, the defendant, The Chesapeake & Ohio Railway Company, by its attorney, filed motion herein; said motion was and is in words and figures as follows, to wit:

United States Circuit Court for the District of Kentucky.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY CO., Defendant.

Now comes the defendant, The Chesapeake & Ohio R'y Co., and moves the court for leave to file an amendment to its petition for removal, heretofore filed on October 16th, 1894, and for leave to file affidavits herein.

W. H. JACKSON,
Attorney for the Chesapeake & Ohio Railway Company.

And on the same day, to wit, on December 22, 1894, an entry was made herein; said entry was and is in words and figures as follows, to wit:

56 JOHN T. POWERS
vs.
THE C. & O. R'Y CO.

Now come the defendant, The Chesapeake & Ohio Railway Company. This cause coming on to be heard upon the motion of defendant for leave to file an amendment to its petition for removal heretofore filed on October 16th, 1894, and for leave to file affidavits herein, and the court having examined said amendment to said petition for removal and the said motion and affidavits, it is ordered that the amended petition and affidavits be filed and stand as a part of the record in this case. Plaintiff objects to said motion and excepts to the ruling of the court thereon.

The amendment referred to in the foregoing entry was and is in words and figures as follows, to wit:

United States Circuit Court for the District of Kentucky.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

Your petitioner, The Chesapeake & Ohio R'y Co., comes
57 and, with leave of court and by way of amendment to its petition for removal heretofore filed in the Kenton circuit court, at Independence, Ky., on October 16th, 1894, reiterates the averments of its said petition as fully as if herein incorporated, except as hereinafter modified and changed, and states that in the bringing of the original suit herein, to wit, on the 7th day of September, 1893, W. D. Boyer and Edward Hickey were fraudulently and improperly joined as parties defendant in the said suit and for the sole purpose of defeating the right of your petitioner to remove this case to the United States circuit court, and that upon a petition for removal by your petitioner, heretofore made and acted upon, said case was remanded to the State court solely because of such fraudulent and improper joinder. Your petitioner states, further, that, at the time of the bringing of said suit and before and since, the said Boyer and Hickey and each of them were citizens and residents of the State of Kentucky and resident in the city of Covington, and that the other codefendant, David Evans, was at the time and since a citizen and resident of the State of Virginia, and that immediately upon the discontinuance of said case as to the said defendants the case was forced to trial, thereby leaving to counsel but a few minutes in which to prepare a petition and bond for removal, and that under these circumstances in writing said petition for removal the draft-man, who was required to write the same in great haste, inadvertently — by mistake wrote in said petition the
58 name of David Evans, when it was intended to write the name of William D. Boyer, and which mistake and clerical error it is now intended to cancel.

Your petitioner further states that the said suit was on the 16th

day of October, 1894, dismissed as to each of the defendants Boyer, Evans, and Hickey, and was then for the first time pending as to the petitioner alone.

Your petitioner further states that by reason of the said improper and fraudulent joinder of said William D. Boyer and Edward Hickey, which it avers was for the sole purpose of defeating the jurisdiction of the United States court, the plaintiff, John T. Powers, is estopped by his fraudulent and improper conduct from now asserting that said petition for removal was not filed within the time required by law for the filing of a petition for removal.

And your petitioner says that this case is now rightfully pending in the United States circuit court for the district of Kentucky, and prays this honorable court to maintain its rightful jurisdiction herein.

THE CHESAPEAKE & OHIO R'Y CO.,
By W. H. JACKSON, *Its Attorney.*

STATE OF OHIO, }
County of Hamilton, } *ss:*

William H. Jackson, being first duly sworn, says that he is the agent and attorney of the Chesapeake & Ohio R'y, a corporation under the laws of the States of Virginia and West Virginia and petitioner in the above-entitled case, and that there is no
59 executive or chief officer or agent of said corporation within Kenton county, Kentucky; that he is duly authorized herein, and that the statements in the above petition for removal are true.

W. H. JACKSON.

Sworn to before me and subscribed in my presence this 21st day of December, 1894.

MAURICE L. GALVIN,
Notary Public, Hamilton County, Ohio.

The affidavits referred to in the foregoing entry were and are in words and figures as follows, to wit:

United States Circuit Court for the District of Kentucky.

JOHN T. POWERS }
vs. }
THE CHESAPEAKE & OHIO R'Y CO. }

STATE OF KENTUCKY, }
County of Kenton, } *ss:*

William D. Boyer, being by me first duly sworn, says that he is the William D. Boyer who was originally sued as defendant in the above-entitled suit in Kenton circuit court, at Independence, Ky., and that at the time of the institution of such suit, to wit, in the month of Sept., 1893, he was and continuously ever since has been and still is a resident and citizen of the State of Kentucky.

Affiant further saith not.

WILLIAM D. BOYER.

60 Subscribed in my presence and sworn to before me this 19th day of Dec., 1894.

J. M. MAHON,
Notary Public, Kenton Co., Ky.

United States Circuit Court for the District of Kentucky.

JOHN T. POWERS
vs.
THE CHESAPEAKE & OHIO R'Y CO.

STATE OF ——,
County of ——, } *ss:*

E. W. Fitzgerald, being by me first duly sworn, says that he is well acquainted with Edward Hickey, who was sued as a defendant in the above-entitled case in the suit instituted in Kenton circuit court, at Independence, Ky., about the month of Sept., 1893; that he knows the residence and citizenship of the said Edward Hickey, and that the said Edward Hickey was at such time and ever since continuously has been and still is a resident and citizen of the State of Kentucky.

And further affiant sayeth not.

E. W. FITZGERALD.

Subscribed in my presence and sworn to before me this 19th day of December, 1894.

L. T. STEWARTS,
Notary Public, Hamilton Co., Ohio.

61 And on a day following, to wit, on January 2, 1895, came the plaintiff, by his attorney, and filed answer to petition for removal and amendment thereto; said answer was and is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Kentucky.

JOHN T. POWERS
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY.

For answer to the petition for removal herein and the amendment thereto plaintiff Powers denies that the defendants Boyer and Hickey oe either of them were fraudulently or impreoperly joined as defendants, and denies that said Boyer and Hickey or either of them was joined as defendants for the sole puepose of defeating the alleged right of the Chesapeake & Ohio Railway Company to remove this cause to the United States circuit court. He denies that on the former application to remove this cause the same was remanded solely or at all because of said alleged fraudulent or improper joinder. He denies that at the institution of this action or

at any time since the defendant Hickey was or has been either a citizen or resident of the State of Kentucky or of the city of Covington.

62 He denies that the joinder of said Boyer and Hickey or either of them was for the sole purpose or for the purpose of defeating the jurisdiction of the United States court. He denies that the joinder of either said Boyer or Hickey was fraudulent or improper. He denies that he is in anywise estopped from asserting that the petition for removal was not filed within the time required by law for the filing of a petition for removal, and denies that this cause is now rightfully pending in the circuit court of the United States. He denies that either inadvertently or by mistake the draftsman of the petition for removal wrote in said petition the name of David Evans when it was intended to write the name of William D. Boyer.

WM. GOEBEL,
Att'y for Plaintiff.

And on a day following, to wit, January 7th, 1895, came the defendant The Chesapeake & Ohio Railway Company and filed a certain exhibit herein; said exhibit was and is in words and figures following, to wit:

Proceedings in the circuit court of the United States for the sixth judicial circuit and district of Kentucky, at a regular May term begun and held at the Federal Court hall, in the city of Covington, on Monday, May 8th, A. D. 1893.

Court met.
Present: Hon. Wm. H. Taft, circuit judge.

63 JOHN T. POWERS
vs.
CHESAPEAKE & OHIO RAILWAY Co. *et al.* } 1834.

Be it remembered that on the 6th day of May, 1893, came the defendants, by their attorneys, and lodged in the clerk's office of this court a transcript of the record and proceedings had in the above case in the Kenton circuit court.

Afterwards, to wit, on the 8th day of May, 1893, the following entry was made herein, viz:

JOHN T. POWERS
vs.
THE C. & O. R'Y Co. } 1834.

This day came the defendant The C. & O. R'y Co., by Messrs. Hallam & Myers, of counsel, and on its motion it is ordered that the transcript of the proceedings had in this case in the Kenton circuit court heretofore lodged in the clerk's office be, and the same is, now filed. On like motion of the defendant, by counsel, it is

ordered that the answer heretofore filed herein be, and the same is, now noted of record. Came again the defendant and filed a motion and moved the court to require the plaintiff to make a deposit or execute a bond for costs herein, as required by the rules of this court.

The transcript referred to in the foregoing order was and is as follows, viz:

64 COMMONWEALTH OF KENTUCKY:

Pleas before the honorable the circuit court in and for the county of Kenton, in said State, at the court-house, in the city of Covington, on the 2nd day of May, 1893.

Hon. Geo. G. Perkins, judge.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY and DAVID EVANS, Defendants. } Ordinary. No. 900.

Be it remembered that heretofore, to wit, on the 14th day of April, 1893, the said plaintiff filed in the said Kenton circuit court, at Independence, in said State, the following petition:

Kenton Circuit Court, at Independence.

JOHN T. POWERS, Plaintiff,
against
THE CHESAPEAKE & OHIO RAILWAY COMPANY and DAVID EVANS, Defendants. } Petition.

The defendant The Chesapeake & Ohio Railway Company is and at the times hereinafter stated was a corporation duly organized under the laws of the State of Virginia, and now owns and operates and at the times hereinafter stated owned and operated a line of railway extending into the county of Kenton, with the locomotive engines, cars, and other appurtenances thereunto belonging.

65 Said defendant is and at the times hereinafter stated was a common carrier whose lines extended into Kenton county. The defendant Evans resides in Kenton county. On the — day of ——, 18—, plaintiff was the servant of the corporate defendant, employed by it as a switchman and one of the crew of said defendant's switching engine numbered twenty-two (22). On said day, and while he was so in the service of the *service of the* corporate defendant in its railway yard, plaintiff was by said defendant ordered and directed to throw a swotch of said defendant's said railway and to put a car on a side track of said defendant's said railway; and thereupon plaintiff did then and there, in said yard of the said corporate defendant, attempt to execute said order and direction of said defendant, and while plaintiff was then and there so at work executing said order and direction of the corporate defendant both of the

defendants did with gross and wanton negligence run and operate the corporate defendant's locomotive engine number fifty-six (56) and tender attached thereto against, upon, and over plaintiff, and thereby his right arm between the elbow and wrist was so crushed that the same was soon thereafter necessarily amputated, and he was otherwise seriously and permanently injured in his person. Defendants then and there with gross and wanton negligence had no light or other warning signal on said tender. Said locomotive engine and tender were then and there run and operated by the defendants backwards, with the tender in front of the locomotive engine and nearest to the plaintiff, and the defendants with gross and wanton negligence gave no signal or warning of
66 of any kind of the moving or approach of said tender or locomotive engine, nor did they have any person on the lookout or to give any signal or warning thereof. In the committing of the wrongs aforesaid the defendant Evans was the agent and servant of his codefendant, and he at the time and place of the committing of the said wrongs had charge, direction, and control of said locomotive engine number fifty-six and the tender attached thereto. By his said injuries plaintiff was made and long continued ill; he suffered and long will continue to suffer great mental and physical pain and anguish, and he is thereby made a helpless cripple, unable to work at his vocation or any other or to earn a livelihood by — his said injuries so inflicted upon him by the said defendants. Plaintiff had been damaged in the sum of twenty-five thousand ($25,000) dollars, for which and for costs he prays judgment.

WM. GOEBEL,
For Plaintiff.

Thereupon, on the same day, April 14th, 1893, a summons and two copies in the usual form were issued; which summons does not appear among the papers.

At a session of said circuit court, at Covington, on the first day of May, 1893, the following order was made and entered of record:

"The defendants each file a petition and tender a bond for removal of this case to the circuit court of the United States, and the plaintiff objects."

The said petitions and bonds for removal are as follows:

67 Kenton Circuit Court, at Independence.

JOHN T. POWERS, Plaintiff,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY and DAVID EVANS, Defendants. } Petition for Removal.

Now comes your petitioner The Chesapeake & Ohio Railway Company and states that the above suit was begun against your petitioner and one David Evans in the Kenton circuit court, at Independence, by filing a petition and issuing a summons on the 14th day of April, 1893, and defendants are not -or is either of them re-

quired by the laws of Kentucky or by the rule of this court to answer or plead unto said complaint before the 4th day of May, 1893.

That your petitioner has not yet filed answer, and that as to your petitioner said cause is now pending; that at the time said suit was begun and at the present time the plaintiff was and continuously since has been and still is a citizen and resident of the State of Kentucky, and the defendants, The C. & O. R'y Co. and David Evans, were and continuously since have been and are citizens and residents of the State of Virginia.

That the matter in dispute in said suit and for which the suit was brought exceeds the sum of $2,000, exclusive of interest and costs.

That said suit is an action to recover against defendants the
68 sum of $25,000 for damages alleged to have been sustained by said plaintiff in having his right arm cut off by reason of gross and wanton negligence of said defendants in the operation of a certain locomotive engine known as engine No. 56, belonging to said defendant, The C. & O. R'y Co., and operated by the said defendant and David Evans as its agent.

That in said suit there is a controversy which is wholly between said plaintiff and said defendant, The C. & O. R'y Co., citizens as aforesaid of different States, and which said controversy can be fully determined as between them, and that said Evans has been by the plaintiff fraudulently joined with this petitioner as a defendant to prevent the removal of this cause to the United States circuit court for the district of Kentucky.

That the defendant The C. & O. R'y Co. hereby offers F. A. Prague, of the city of Covington and county of Kenton, as surety for its entering into the circuit court of the United States for the district wherein said suit is pending, on the first day of the next session of said court or before, a copy of the record in said suit, and for paying all costs that are awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto, and also for this petitioner appearing and entering special bail in said suit if special bail was ordinar-y requisite therein.

Wherefore defendants pray this honorable court that the cause
be removed into the circuit court of the United States for the
69 district of Kentucky, and that this court proceed no further in the premises except to grant said order of removal.

HALLAM & MYERS,
W. H. JACKSON,
For Petitioner.

STATE OF KENTUCKY, }
Kenton County, } *sct:*

Chas. F. Firth says that he is the freight agent of the said defendant, The Chesapeake & Ohio Railway Company, at Covington, the station nearest the county-seat of Kenton county, and that there is no chief officer of said company in said county, and that he has read the foregoing petition and knows the contents thereof, and that the same is true.

C. F. FIRTH.

Subscribed and sworn to before me by Chas. F. Firth this 29th day of April. 1893.

J. M. MAHON,
Notary Public, Kenton Co., Ky.

Kenton Circuit Court, at Independence.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE & OHIO R'Y CO. and DAVID EVANS, Defendants. } Bond.

Know all men by these presents that the Chesapeake & Ohio Railway Company, a citizen and resident of the State of Virginia, as principal, and F. A. Prague, of the city of Covington, Ky.,
70 as surety, are jointly and severally held and firmly bound unto John T. Powers in the sum of $2,000; for which, well and truly to be paid unto the said John T. Powers, his heirs, executors, administrators, and assigns, we bind ourselves, our heirs, executors, administrators, and assigns, firmly by these presents.

Signed and dated this first day of May, 1893.

The condition of this bond is such that if the said Chesapeake & Ohio Railway Company, defendant in the above-entitled case, shall enter into the circuit court of the United States for the district of Kentucky, on the first day of the next session thereof or before, copy of the record in said suit and shall pay all costs that may be awarded by said circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto, and shall also appear and enter special bail in said suit if special bail shall be requisite herein, then said obligation to be void and of no effect, and otherwise to remain in full force and virtue of law.

In witness whereof said obligators hereunto set their hands and seals this first day of May, 1893.

F. A. PRAGUE.

Attest: H. C. HALLAM, *Clerk*,
By H. K. CONNOLLY, *D. C.*

Kenton Circuit Court, at Independence.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY and DAVID EVANS, Defendants. } Petition for Removal.

71 Now comes your petitioner, David Evans, and states that the above suit was begun against your petitioner and the Chesapeake & Ohio Railway Co. in the Kenton circuit court, at Independence, by filing a petition and issuing summons on the 14th day of April, 1893, and defendants are not nor is either of them required by the laws of Kentucky or the rule of this court to answer or plead unto said complaint before the 4th day of May, 1893.

That your petitioner has not yet filed answer, and that as to your petitioner said cause is pending; that at the time said suit was begun and at the present time the plaintiff was and continuously since has been and still is a citizen and resident of the State of Kentucky and the defendants, The C. & O. R'y Co. and David Evans, were and continuously since have been and are citizens and residents of the State of Virginia.

That the matter in dispute in said suit and for which said suit was brought exceeds the sum of $2,000, exclusive of interest and costs.

That said suit is an action to recover against defendants the sum of twenty-five thousand ($25,000) dollars for damages alleged to have been sustained by the plaintiff in having his right arm cut off by reason of the gross and wanton negligence of said defendants in the operation of a certain locomotive engine known as engine No. 56, belonging to said defendant, The Chesapeake & Ohio Railway Company, and operated by the said defendant, David Evans, as its agent; that in said suit there is a controversy which is wholly between the plaintiff and the defendant David Evans, citizens,
72 as aforesaid, of different States, and which said controversy can be fully determined as between them.

That the defendant David Evans hereby offers F. A. Prague, of the city of Covington and county of Kenton, as surety for his entering into the circuit court of the United States for the district of Kentucky, on the first day of the next session of said court or before, a copy of the record in said suit, and for paying all costs that may be awarded by said circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto, and also for this petitioner appearing and entering special bail in said suit if special bail was ordinarily requisite therein.

Wherefore defendant prays this honorable court that this cause be removed to the circuit court of the United States for the district of Kentucky, and that this court proceed no further in the premises except to grant this order of removal.

HALLAM & MYERS,
W. H. JACKSON,
Att'ys for Petitioner.

STATE OF KENTUCKY, }
Kenton County, } *sct:*

David Evans says that he is one of the defendants in the above-entitled cause, and that the statements of the foregoing petition are true.

DAVID EVANS.

Subscribed and sworn to before me this 26th day of April, 1893.
JENNIE M. MAHON,
Notary Public, Kenton County, Ky.

73 Kenton Circuit Court, at Independence.

JOHN T. POWERS, Plaintiff,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY and DAVID EVANS, Defendants. } Bond.

Know all men by these presents that David Evans, a citizen and resident of the State of Virginia, as principal, and F. A. Prague, of the city of Covington, Ky., as surety, are jointly and severally held and firmly bound unto John T. Powers in the sum of $2,000; for which, well and truly to be paid to said John T. Powers, his heirs, executors, administrators, and assigns, — firmly by these presents.

Signed and dated this 1st day of May, 1893.

The condition of this bond is such that if the said David Evans, defendant in the above-entitled cause, shall enter into the circuit court of the United States for the district of Kentucky, on the first day of the next session thereof or before, a copy of the record of this suit, and shall pay all costs that may be awarded by said circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto, and shall also appear and enter special bail in this suit if special bail is requisite herein, then said obligation to be void and of no effect; otherwise to remain in full force and virtue of law.

In witness whereof said obligators hereunto set their hands and seals this first day of May, 1893.

74 DAVID EVANS.
F. A. PRAGUE.

Attest: H. C. HALLAM, *Clerk*,
By H. K. CONNOLLY, *D. C.*

At a session of said circuit court, at Covington, on the 2nd day of May, 1893, the following order was made and entered of record: "The bonds for removal are approved."

Kenton Circuit Court.

I, H. C. Hallam, clerk of said circuit court, certify that this and the preceding 10 pages contain a complete and true transcript of the record in the case named in the caption.

H. C. HALLAM, *Clerk*,
By H. K. CONNOLLY, *D. C.*

The answer of the C. & O. R'y Co., filed May 6th, 1893, is as follows:

United States Circuit Court, District of Kentucky.

JOHN T. POWERS, Plaintiff,
vs.
CHESAPEAKE & OHIO R'Y Co. and DAVID EVANS, Defendants.

Answer of C. & O. R'y Co.

For its separate answer to plaintiff's petition in this action defendant The Chesapeake & Ohio Railway Company denies that it did with gross and wanton negligence or in any manner run or operate any locomotive engine or tender, or either, upon or over the plaintiff, or that with gross and wanton or any negligence or in any manner it had no light or warning signal on said tender, or that any locomotive engine or tender was by it run or operated backwards or with the tender in front of the locomotive
75 engine or nearest the plaintiff, or that it with gross and wanton or with any negligence or in any manner gave no signal or warning of the moving or approach of a locomotive engine and tender or either, or that it did not have any person on the lookout or to give signal or warning, or that it in any manner inflicted on the plaintiff any of the wrongs or injuries by him complained of, but this defendant says the said negligence, wrongs, and injuries, if done or *af*flicted at all, were each and all done and inflicted by its codefendant, David Evans, and that said David Evans was then and there the feollow-servant of the plaintiff in the same line of this defendant's employment, and that the said alleged negligences, wrongs, and injuries were alone the negligences, wrongs, and injuries of the said David Evans.

Wherefore this defendant prays judgment that it be hence dismissed with its costs.

HALLAM & MYERS,
W. H. JACKSON,
Att'ys for C. & O. R'y Co.

THE STATE OF KENTUCKY, *Kenton County,* } *sct:*

Chas. F. Firth says that he is the freight agent of the said defendant, The Chesapeake & Ohio Railway Company, at Covington, the station nearest the county-seat of Kenton county, and that there is no chief officer of said company in said county, and that he has read the foregoing answer and believes the statements therein contained are true.

C. F. FIRTH.

Subscribed and sworn to before me by said Chas. F. Firth this 6th day of May, 1893.

J. M. MAHON,
Notary Public, Kenton County, Ky.

76 On a day following, to wit, May 9th, A. D. 1893, the following order was entered herein, viz:

JOHN T. POWERS
vs.
THE C. & O. R'Y Co. } 1834.

On motion of defendant for a deposit or bond for costs, it is ordered that plaintiff have sixty days in which to make such deposit or give such bond as is in that behalf required by the rules of the court.

And on the same day, May 9th, 1893, the following order was entered herein, viz:

JOHN T. POWERS
vs.
THE C. & O. R'Y Co. } 1834.

This day came the plaintiff, by Wm. Goebel, Esq., of counsel, and moved to remand this cause to the State court for further proceedings therein; came also the said plaintiff, by his counsel, and filed his answer to the defendant's petition for removal. The court takes times. It is ordered that this case be, and same is, now set at the foot of the trial docket, and is set for hearing the 9th day of the term.

Answer of the plaintiff to the petition of removal of David Evans is as follows, viz:

77 United States Circuit Court, District of Kentucky.

JOHN T. POWERS
vs.
THE C. & O. R'Y Co.

For answer to the petition for removal of defendant David Evans the plaintiff, John T. Powers, denies that at the time this suit was begun or at any time since this suit was begun or at the present time he, the plaintiff, was or is a citizen or a resident of the State of Kentucky or of any State other than the State of Virginia. He denies that at the time this suit was begun or at any time or at the present time the petitioner David Evans was or is a citizen or resident of the State of Virginia or a citizen of any other State than the State of Kentucky. He denies that in said suit is a controversy which is wholly between said plaintiff, Powers, and said defendant, Evans, and which can be fully determined between them.

He therefore prays that this action be remanded to the Kenton circuit court.

WM. GOEBEL,
Att'y for Plaintiff.

Plaintiff's answer to petition for removal of the C. & O. R'y Co. is as follows, viz:

78 United States Circuit Court, District of Kentucky.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE & OHIO R'Y CO., &c., Defendants.

For answer to the petition for removal herein filed by the defendant The C. & O. R'y Co. the plaintiff denies that at the time this suit was begun or at any time since this suit was begun or at the present time he, the plaintiff, was or is a citizen or a resident of the State of Kentucky. He denies that for a long time before the beginning of this suit continuously until the bringing of this suit and to the present time he was or is either a citizen or resident of any other State than the State of Virginia. He denies that at the time this suit was begun or at any time since or now the defendant David Evans is or was either a citizen or resident of the State of Virginia or of any State other than Kentucky. He denies that in this case there is a controversy between citizens of different States which can be fully determined between them. He denies that said Evans was fraudulently joined with the petitioner The C. & O. R'y Co. to prevent the removal of this cause to the United States circuit court for the district of Kentucky.

The plaintiff prays this action be remanded to the Kenton circuit court and for all other proper relief.

WM. GOEBEL,
Att'y for Plaintiff.

79 On May 10th, A. D. 1893, the following order was entered herein, viz:

JOHN T. POWERS
vs.
THE C. & O. R'Y CO. } 1834.

This cause coming on to be heard upon the motion of plaintiff to remand this cause to the State court for further proceedings herein, came also the defendant, by Hallam and Myers, its attorneys; whereupon argument was heard on said motion, and the court, not being advised, takes time, and said motion is submitted.

On May 11th, A. D. 1893, the following order was entered herein, viz:

JOHN T. POWERS
vs.
THE C. & O. R'Y CO. } 1834.

This cause coming on to be heard on the motion of plaintiff to remand this cause to the State court for further proceedings herein, and the court being now advised, it is ordered that said motion be, and same is, overruled.

Interrogatories of defendant filed May 16th, 1893, are as follows, viz:

80 United States Circuit Court, District of Kentucky, at Covington.

JOHN T. POWERS
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY and DAVID EVANS.

Interrogatories to be Propounded to George E. Evans, to be Read as Evidence on Behalf of the Defendants in the Trial of the Above Case.

Int. 1. Where do you reside?
Int. 2. What is the State of your residence?
Int. 3. How long have you lived in that State?
Int. 4. In what way are you connected with the defendant David Evans?
Int. 5. Of what State is David Evans a citizen?
Int. 6. What blood relations has the defendant David Evans living in Virginia?
Int. 7. Has he any blood relations living in the State of Kentucky?

HALLAM & MYERS,
Att'ys for Def't.

United States Circuit Court, District of Kentucky, at Covington.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY CO. and DAVID EVANS, Defendants. } Interrogatories.

81 *Interrogatories to be Propounded to Richard Evans, to be Read as Evidence on Behalf of the Defendants in the Trial of the above Cause.*

Int. 1. Where do you reside?
Int. 2. What is your State of residence?
Int. 3. How long have you lived in that State?
Int. 4. In what way are you connected with the defendant David Evans?
Int. 5. Of what State is David Evans a citizen and resident?
Int. 6. What blood relations has the defendant David Evans living in Virginia?
Int. 7. Has he any blood relations living in the State of Kentucky?

HALLAM & MYERS,
Att'ys for Def't.

On May 17th, A. D. 1893, an order was entered herein which was and is as follows, viz:

JOHN T. POWERS
vs.
THE C. & O. R'Y CO. } 1834.

On motion of plaintiff, by his counsel, Hon. Wm. Goebel, it is ordered that this action be and same is discontinued at the cost of plaintiff, without prejudice to another action.

82 UNITED STATES OF AMERICA, }
District of Kentucky, } *ss:*

I, Joseph C. Finnell, clerk of the circuit court of the United States for the sixth judicial circuit and district of Kentucky, at Covington, do hereby certify that the foregoing 16 pages, this included, contain a true and correct transcript of the record and proceedings had in the case set out in the caption hereto as same now appears from the records and files of this office.

Witness my hand and the seal of said circuit court, at Covington, this 12th day of June, A. D. 1894, and of our Independence the 118th year.

JOSEPH C. FINNELL, *Clerk,*
By F. D. COCHRAN, *D. C.*

And on a day following, to wit, February 12th, 1896, a *nunc pro tunc* order was made and entered herein; said order was and is in words and figures as follows, viz:

JOHN T. POWERS
vs.
THE C. & O. R'Y CO.

83 It appearing to the court that the following order made by the court on January 7, 1895, has by clerical error been omitted from the journals of the court, said error is now entered as of said date, to wit:

This cause, coming on to be heard upon the motion of plaintiff to remand the cause to the Kenton circuit court, having been argued by counsel, is now overruled and the bond tendered by the defendant is approved; to all of which the plaintiff excepts. Court filed opinion.

The opinion referred to in the foregoing entry was and is in words and figures as follows, to wit:

Circuit Court of the United States for the District of Kentucky.

JOHN T. POWERS
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY.

Before Taft and Barr, JJ.

This is a motion to remand a cause from the circuit court of Kenton county, Kentucky. On April 14th, 1893, the plaintiff Powers,

a citizen of Kentucky, filed his petition in the Kenton circuit court against the Chesapeake & Ohio Railway Company and David T. Evans, alleging that the defendant railway company was a citizen of Virginia, and that Evans was a citizen of Kenton county, Kentucky, and that both defendants were jointly guilty of negli-
84 gence in the operation of a train on the Chesapeake & Ohio railroad which resulted in severe injuries to the plaintiff, for which he asked damages against both in the sum of $25,000.00. On April 29th, before an answer was required to be filed under the laws and practice of Kentucky, each defendant filed a petition to remove the cause to this court on the ground that both defendants were citizens of Virginia, while the plaintiff was a citizen of Kentucky. The plaintiff, by answer to the petition for removal, raised an issue of fact as to the citizenship of Evans, alleging that he was a citizen of Kentucky, and moved to remand the case. This court found that Evans was a citizen of Virginia and denied the motion. The plaintiff thereupon, on May 17th, 1893, dismissed his action in this court and filed a new petition on the same cause of action in the Kenton circuit court, in which he made defendants not only the Chesapeake & Ohio Railway Company and Evans, but also William D. Boyer and Edward Hickey. The petition alleged that the plaintiff was a switchman in the employ of the Chesapeake & Ohio Railway Company; that while engaged in throwing a switch at night he was run down by an engine of the company and severely injured; that the engine was running backwards, drawing a caboose, and that the accident occurred and that the injuries were inflicted because of the joint gross and wanton negligence of the railway company and Boyer, the conductor; Evans, the engineer, and Hickey, the fireman, the last three of whom had posses-
85 sion, direction, and control of the engine and caboose as agents of the company. Damages were asked in the sum of $25,000.00. Before its answer was required by the law of Kentucky to be filed the Chesapeake & Ohio railway filed a petition for removal to this court, which, after generally describing the suit and the amount involved, proceeded as follows:

"That there is in said suit a controversy which is wholly between citizens of different States and which can be fully determined as between them, to wit, between your petitioner, The Chesapeake & Ohio Railway Company, defendant in said suit, who avers that it was at the commencement of this suit and still is a corporation organized under the laws of the States of Virginia and West Virginia and of no other States, and that it was then and there and still is a resident and citizen of the States of Virginia and West Virginia and of no other State; that it was not then and is not now a resident or citizen of the State of Kentucky, and the plaintiff, John T. Powers, who was at the commencement of this suit and still is a resident and citizen of the State of Kentucky.

Your petitioner further says that the said Wm. D. Boyer, David Evans, and Edward Hickey are fraudulently and improperly joined as parties defendants for the sole purpose of defeating the right of petitioner to remove to the United States circuit court."

Bond was given and the cause removed.

Plaintiff answered the petition for removal in this court, denied that the controversy was wholly between citizens of different States, and denied that the three defendants, Boyer, Evans, and Hickey, had been fraudulently or improperly joined to defeat the codefendant's "pretended right of removal."

It being admitted that Boyer and Hickey were citizens of Kentucky, this court granted the motion to remand, holding that as plaintiff's petition stated a good cause of action against Boyer,
86 Evans, and Hickey the plaintiff had the right to unite them as defendants with the railway company, even if it was done with the intention of defeating the jurisdiction of the Federal court; that when a tort was committed by several the injured person had an election to sue one or all, and the motion for the election could not be made a ground for treating as a separable cause of action against a single defendant that which the plaintiff had chosen to treat as a joint one; that in a Federal court the petition as against the Chesapeake & Ohio Railway Company was probably demurrable, but it was not so against the other defendants, and because a removing defendant had a good defense in law or fact to a joint action it did not thereby become, with respect to such defendant, a separable controversy.

The cause proceeded to issue in the State court, and on October 16th, 1894, the plaintiff discontinued his cause as to all the defendants except the Chesapeake & Ohio Railway Company. The defendant at once filed a petition for removal to this court and tendered a bond. The plaintiff objected, and the court denied the petition and declined to approve the bond, "but not for lack of sufficiency thereof." The cause then proceeded in the State court to trial, verdict, and judgment for plaintiff in the sum of $10,000 00.

The defendant filed the transcript of the proceedings in this court before the first day of this term, the next after the denial of the second petition for removal by the State court. The petition was like the first except in the following clauses:
87 "Your petitioner further says that in the bringing of this suit heretofore, on the — day of ——, 189–, David Evans and Edward Hickey were fraudulently and improperly joined as parties defendant in the above-entitled cause for the sole purpose of defeating the right of your petitioner to remove this cause to the United States circuit court; that because of the joinder of the said Evans and Hickey said cause was remanded to the State court. Your petitioner says that the suit as to said Evans and Hickey was on the 16th day of October, 1894, dismissed; that the said cause is now for the first time pending as — the Chesapeake & Ohio Railway Company alone."

Plaintiff filed an answer to the petition in this court and a motion to remand. The answer denies that the defendants other than the Chesapeake & Ohio Railway Company were fraudulently or improperly joined to defeat the latter's alleged right of removal.

In support of the petition for removal the defendant has filed the affidavits of Evans and Boyer, stating that the discontinuance as to

them was made by plaintiff without consideration moving from them and without their request or knowledge. The record shows that Hickey was never served with summons.

TAFT, *Circuit Judge:*

88 A plaintiff has a joint and several cause of action against a citizen of another State and citizens of his own State. He joins them in a single action in the State court for the sole purpose of preventing removal by the non-resident to the Federal court. After the statutory time for removal has passed and the joinder of the resident defendants has, as he thinks, effected his purpose, the plaintiff discontinues the case as to all but the non-resident defendant. Does this conduct estop the plaintiff from making the objection that the petition for removal filed immediately after the discontinuance is too late? This is the question which the defendant seeks to raise, and we must first determine whether it is squarely presented for our decision.

The circumstances shown by this record leave no doubt that the purpose of the plaintiff in the joining of Evans, Boyer, and Hickey as defendants was to defeat the railway company's right to remove the cause. In the first suit Evans, the fireman, was made codefendant with the company. When it was found that his citizenship was not such as to defeat removal, the suit was dismissed and a new one brought, with the engineer and conductor as additional defendants. They were shown to be citizens of Kentucky, and thereby the removal of the new case was defeated. Just before the trial, without request or knowledge on their part, the defendants, except the company, were dismissed. Counsel seek to explain the dismissal

89 on the ground that Hickey, one of the defendants, had not been served with summons, and that the presence of the others as parties defendant was made the basis of an unfounded claim that the trial should be transferred from Independence to Covington. The record does not show that either of the defendants Boyer or Evans moved to transfer or that their presence in the case made the transfer necessary. Even if it did so appear, the explanation is insufficient. It is a virtual confession that they were not joined in good faith to obtain judgment against them. Courts are not required to be blind to plain facts. The joinder of a fireman or an engineer or a conductor as defendants in an action to recover $25,000 against a railroad company, without explanation, of itself raises a suspicion that it is not done merely to recover judgment against the employé, and when a cause is dismissed in the Federal court, in order to make such employés parties to a new suit, and after fear of removal is passed they are then dismissed, the inference as to the purpose of their joinder is too plain to need much discussion. In Arrowsmith *vs.* The Nashville & Decatur Railway Company, 57 Fed. Rep., 165, Judge Lurton made a similar inference from an analogous though not the same state of facts.

But it is said that the petition for removal is defective, in that it does not aver that Boyer was fraudulently joined as a defendant and subsequently dismissed.

The petition for removal stated the necessary jurisdictional
90 facts, namely, the diverse citizenship, the jurisdiction- amount, and averred that removal within statutory time had been prevented by fraud of plaintiff. It is true that in mentioning the names of the defendants who were alleged to have been joined fraudulently in order to defeat the jurisdiction of the Federal court and to have been dismissed after serving this purpose, Boyer was by an evident mistake omitted, but this was merely an omission to state all the evidential facts on which the claim of fraudulent estoppel was based, but it did not destroy the legal sufficiency of the petition to show an estoppel. It is settled beyond controversy that it is not for the State courts to pass upon the facts involved in the averments of a petition for removal. It can only deny an application to remove when as a matter of law on the face of the petition and the facts disclosed by the record the right does not exist. Kansas City, Ft. Scott & Memphis R. R. Company *vs.* Daughtry, 138 U. S., 298; Crehore *vs.* Ohio & Mississippi Railway Company, 131 U. S., 240; Burlington, Cedar Rapids, etc., Railway *vs.* Dunn, 122 U. S., 513; Carson *vs.* Hyatt, 118 U. S., 279.

An examination of the record in this case would have shown the joinder of Evans, Hickey, and Boyer, the averment in the first petition for removal that they had all been fraudulently joined to defeat removal, and their subsequent dismissal from the case. This is a case, therefore, where an amendment to the petition for removal can be permitted in this court to state more fully and exactly all
91 the facts upon which the removal was prayed, because the ultimate jurisdictional facts are correctly stated and the detailed facts concerning the fraud, though imperfectly stated in the petition for removal, all appear in the record. Carson *vs.* Dunham, 121 U. S., 421, 427; Ayers *vs.* Watson, 113 U. S., 594, 598; Crehove *vs.* Ohio & Mississippi R. R. Co., 131 U. S., 240; Jackson *vs.* Allen, 132 U. S., 27; Martin's A'm'r *vs.* Baltimore & Ohio R. R., 151 U. S., 673–691. It is true, also, that there is in the petition no direct statement that the reason why the joinder of Hickey and Boyer defeated the jurisdiction of the Federal court was because they were citizens of the same State as the plaintiff, though this is a necessary inference from the averments made; but it does appear from the ruling of this court on the first petition for removal, which was made a part of the record in the State court, that it was then admitted by both plaintiff and defendant that Boyer & Hickey were citizens of Kentucky, and that for this reason the motion to remand was granted. Defendant has been given leave to amend its petition for removal to restate the facts as above suggested and an amended petition has been filed.

On the whole, therefore, we conclude that the question is fairly before us whether the joinder by the plaintiff in a State court of resident defendants, against whom a good cause of action is stated, solely to prevent removal by a non-resident defendant, and
92 the subsequent dismissal of such resident defendants from the case, leaving the suit against the non-resident alone, estops plaintiff to plead the time of limitation against removal.

The question is a new one, but we think its answer is not difficult in view of the ruling of the Supreme Court of the United States in analogous cases. It has long been held that the joinder of a sham defendant to defeat the jurisdiction of the Federal court could not prevent removal, but those cases were where, on the face of the declaration of the plaintiff, no cause of action was stated against the defendants whose joinder was charged to be fraudulent. Arapahoe County *vs.* Kansas Pacific R'y Co., 4 Dill., 277; Federal Cases, 502, and Arrowsmith *vs.* The Nashville & Decatur Railway Company, 57 Fed Rep., 165. Here in plaintiff's petition a good cause of action was stated against the defendants alleged to have been fraudulently joined, and if the cause had proceeded to judgment against or in favor of these defendants no removal could have been had at any stage of the case. This court has already decided in this case that the motive a plaintiff has in suing defendants against whom he can state a good cause of action cannot affect the question of removing the case to the Federal court as long as they remain parties to the cause. We see no reason now to question that conclusion.

But the motive of plaintiff in joining such defendants does
93 become material if he subsequently dismisses them and makes the case, before the final trial, one which would have been removable had it not been thus originally brought. If the court can gather from the circumstances that the joinder and subsequent dismissal of the other defendants was a mere device to defeat a removal by the non-resident defendant within the statutory time and with no purpose of ever pushing the case to judgment against the others we are very clear that the plaintiff ought not to be allowed to take advantage of a delay in removal which his own fraud brought about, and that he must be estopped to use that delay as an objection.

It has been several times decided by the Supreme Court that the time for removing the case fixed by the statute is not indispensable to the jurisdiction of the Federal court, but that it may be waived by the consent and acquiescence of the parties, and that a party may be estopped by his conduct to allege it as an objection to removal.

In Ayres *vs.* Watson, 113 U. S., 595, a defendant filed his petition for removal to the Federal court after the time had elapsed within which the statute required it to be filed. The cause was removed and resulted in a judgment against the defendant, who, on appeal, sought to reverse the judgment on the ground that the circuit court was without jurisdiction, because the petition for removal was not filed in time. The Supreme Court held that as the party objecting had himself removed the case he was estopped to make such
94 an objection. This was under the removal act of 1875, but, though the time for removal is changed, this question is not different under the acts of 1887 and 1888. We quote in full the language of Mr. Justice Bradley upon the point:

"By section 2 of the act of 1875 any suit of a civil nature, at law or in equity, brought in a State court, where the matter in dis-

pute exceeds the value of $500, and arising under the Constitution or laws of the United States, or in which The United States is plaintiff, or in which there is a controversy between citizens of different States, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign State, citizens of subjects, either party may remove said suit into the circuit court of the United States for the proper district, and when in any such suit there is a controversy wholly between citizens of different States, which can be fully determined as between them, one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit to the circuit court of the United States for the proper district. This is the fundamental section based on the constitutional grant of judicial power. The succeeding sections relate to the forms of proceeding to effect the desired removal. By section 3 it is provided that a petition must be filed in the State cou[illegible] before or at the time at which the cause can be first tried and b[illegible]re the trial thereof, for the removal of the suit into the circuit [illegible]rt, and with such petition a bond, with condition, as prescribed [illegible] the act. The second section defines the cases in which a removal may be made; the third prescribes the mode of obtaining it and the time within which it should be applied for. In the nature of things, the second section is jurisdictional, and the third is but modal and formal. The conditions of the second section are indispensable and must be shown by the record; the directions of the third, though obligatory, may to a certain extent be waived. Diverse State citizenship of the parties or some other jurisdictional fact prescribed by the second section is absolutely essential and cannot be waived, and the want of it will be error at any stage of the cause, even though assigned by the party at whose instance it was committed. Mansfield & Coldwater Railway Co. *vs.* Swan, 111 U. S., 579. Application in due time and the proffer of a proper bond, as required in the third section, are also essential, if insisted on, but, according to the ordinary principles which govern such cases, may be waived, either expressly or by implication. We see no reason, for example, why the other party may not waive the required bond or any information
95 in it or any informalities in the petition, provided it states the jurisdictional facts, and if these are not properly stated there is no good reason why an amendment should not be allowed, so that they may be properly stated. So, it seems to us, there os no good reason why the other party may not also waive the objection as to the time within which the application for removal is made. It does not belong to the essence of the thing. It is not in its nature a jurisdictional matter, but a mere rule of limitation. In some of the older cases the word jurisdiction is often used somewhat loosely, and, no doubt, cases may be found in which this matter of time is spoken of as affecting the jurisdiction of the court. We do not so regard it, and, since the removal was affected at the instance of the party who now makes the objection, we think that he is estopped. In Railroad Co. *vs.* Knootz, 104 U. S., 5, 17, we held that

where the State court disregarded a petition for removal properly made, and the plaintiff continued to prosecute the suit therein, he would be deemed to have waived any objection to the *the* delay of the defendant in entering the cause in the circuit court of the United States until the decision of the State court is reversed."

Ayres *vs.* Watson has lately been reviewed by Mr. Justice Gray, speaking for the Supreme Court, in Martin's Administrator *vs.* The Baltimore & Ohio R. R. Company, 151 U. S., 673. In that case it was held that an objection that a petition for removal was not filed in time under the acts of 1887 and 1888 was waived if not taken before the trial in the circuit court. Ayres *vs.* Watson, *supra*, and French *vs.* Hay, 22 Wallace, 238, are cited in support of this conclusion. After quoting at some length from Mr. Justice Bradley's opinion in the former case, Mr. Justice Gray says: "His whole course of reasoning leads up to the conclusion that the time of removal, not being a jurisdictional and essential fact, is a subject of waiver and estoppel alike."

96 The decision in Ayres *vs.* Watson as to the waiver in the circuit court of the United States of the objection that the petition for removal had not been seasonable filed in the State court has never been doubted or qualified. Pages 690 and 691.

The circuit court of appeals of this circuit has applied the same principle in Newman *vs.* Schwerin, 61 Fed. Rep., 865, and the circuit court of appeals in the fifth circuit in the case of Knight *vs.* The Railway, 61 Fed. Rep., 87.

The nearest approach to an authority for the case at bar is to be found in language of the present Chief Justice in the case of Northern Pacific Railway Company *vs.* Austin, 135 U. S., 315, 318. In that case a plaintiff brought suit for $475, making a controversy involving less than $500, which was then the minimum limit of the jurisdiction of the United States circuit courts, and thus prevented removal. After the jury was impanelled in the State court and the trial begun, the trial court, against defendant's objection and exception, permitted an amendment increasing the amount claimed in the *ad damnum* clause to $1,000. Verdict and judgment of $750 were rendered, and on a writ of error the case was brought to the Supreme Court of the United States. The error alleged was in permitting the amendment. The court held that the only way by which the defendant could protect himself against the action of the court in allowing the amendment was by at once filing a petition for removal, and that, not having done so, no right secured

97 by a statute or the Constitution of the United States had been denied him, and the action of the court in permitting the amendment was not, therefore, reviewable by the Supreme Court of the United States. After reaching this conclusion the Chief Justice continued:

"If the application had been made, the question would then have arisen whether it came too late under the circumstances. The defendant was not entitled to remove the suit as originally brought 'before or at the term at which such cause could be first tried and

before the trial thereof.' But the objection to removal, depending upon the absence of the jurisdictional amount, was obviated by the amendment. As the time within which a removal must be applied for is not jurisdictional, but modal and formal—Ayres *vs.* Watson, 113 U. S., 594, 598—it may, though obligatory to a certain extent, be waived; and as where a removal is effected the party who obtains it is estopped upon the question of the time, so, if the conduct of the plaintiff in a given case were merely a device to prevent a removal, it might be that the objection as to the time could not be raised by him. If, on the other hand, the motives of the plaintiff could not be inquired into or, if admitted, would not effect the result, as in most cases of remittitur—Thompson *vs.* Butler, 95 U. S., 694; Pacific Postal Telegraph Co. *vs.* O'Connor, 128 U. S., 394—the defendant would simply suffer for want of comprehensiveness in the statute. The amendment here was held to have been properly allowed, and we have no power or disposition to interfere with the action of the court in regard to it. The only importance it has is in its bearing upon the charge of bad faith in respect to the right of removal, and that question cannot properly arise in the absence of an application to remove."

Now, it may be admitted that this language was not necessary to the decision of the case, and that it was not in the form of a positive statement of law, but is rather only an intimation of a possible or probable conclusion which the court would reach were a case of the kind suggested presented for its decision. Nevertheless the conclusion intimated is such a necessary sequence from the reasoning of the court in Ayres *vs.* Watson, *supra*, in Martin *vs.*
98 Baltimore & Ohio T. R., *supra*, and in French *vs.* Hay, *supra*, that we have no difficulty in applying to in the case at bar. It is sought to distinguish Austin's case from the one at bar on the ground that the amendment in that case changed the cause of action, while here the cause of action remained the same and was not changed by the dismissal of the resident defendants. The distinction is untenable. The cause of action in Austin's case was the same after the amendment as before. The maximum limit of recovery was increased by the amendment; that was all. In the case at bar, that which had been declared on as a joint tort was changed by the plaintiff voluntarily into a several liability. In each case, though the cause of action remained the same, the plaintiff so changed its form as to bring it within the jurisdiction of the Federal court. In each the first form of action was evidently adopted as a device to prevent removal seasonably under the statute with intent to restore the cause of action to a removable form when the statutory time had elapsed. The cases are quite parallel and the estoppel is as plain in the one as in the other.

In the Austin case it was not the reduction of the amount claimed below five hundred dollars with intent to defeat removal which made the case removable, but it was the reduction with such a purpose, accompanied by a subsequent charge of the form of the
99 action so as to bring it within the removal jurisdiction of the Federal court. Had the plaintiff never amended the case

would never have been removable, however plain the intent of the plaintiff to defeat removal by limiting his own recovery. He would have the right to defeat removal in this way by giving up part of his claim.

So, in the case at bar, had the plaintiff retained the resident defendants as parties until the judgment, however clear it was that his intent in so doing was to defeat removal, the case could not have been removed because in his petition he stated a good cause of action against the defendants so joined; but when he dismissed the resident defendants he made a removable case, and the palpable device adopted to prevent an earlier removal disables him from pleading the time limitation. On the other hand, if the plaintiff, in good faith and not for the purpose of defeating the Federal jurisdiction, unites defendants resident and non-resident in a single joint cause of action, and before trial is had and judgment rendered the resident defendants are dismissed from the case by the court or otherwise, leaving a controversy between the plaintiff and non-resident defendants within the removal jurisdiction of the Federal court, except that the time for removal is past, the case cannot be removed against the plaintiff's objection, for he is not estopped to plead the time limitation which begins to run from the beginning
100 of a suit and not from the time when the case assumes the form of a removable controversy.

A case like the one at bar is not to be confused with cases like that of Arrowsmith *vs.* The Nashville & Decatur Railway Company, 57 Fed. Rep., 165; and Arapahoe County *vs.* Kansas Pacific Railway Company, 4 Dill., 277; Fed. Cases, 502. In those cases the plaintiff's pleading showed that the resident defendants were merely nominal or sham defendants, because no cause of action was stated against them in the one case, and no relief was asked against them in the other. In such a case of course the petition for removal must be filed within the statutory time, or the right is lost. The joinder of the sham defendants does not prevent the removal and is no excuse for any delay in perfecting it; but in the case at bar the plaintiff's petition stated a good cause of action against all the defendants. Until the resident defendants were dismissed the case was not within the jurisdiction of the Federal court and the right of removal did not accrue. Hence it was necessary to file a new petition for removal after the dismissal, because then for the first time the controversy was one — which the Federal court could take cognizance.

If this distinction is borne in mind, the case of Kansas City, Ft. Scott and Memphis Railroad Company *vs.* Daughtry, 138 U. S., 298, will be found to have nothing in it to conflict with our con-
101 clusion here. In that case the plaintiff brought suit in a State court of Tennessee against the Kansas City, Fort Scott and Memphis Railroad Company, a citizen of Arkansas, and the Kansas City, Memphis and Birmingham — Company, a citizen of Tennessee, for the recovery of damages for the death of John W. Daughtry, alleged to have been occasioned by the negligence of the defendants. The first-named company was in default for plea to

the declaration for four terms of court, and then filed its petition for removal, averring that the jurisdictional amount was in controversy; that the plaintiff was a citizen of Tennessee; that it, the petitioner, was a citizen of Arkansas; that its codefendant was a citizen of Tennessee; that the acts alleged to have been done jointly by petitioner and its codefendant were, if done at all, done by the petitioner alone, and its codefendant did not at the time and "does not now and never did own, possess, control, or use the said railroad track upon which said acts were done, etc.; that the said Kansas City, Memphis and Birmingham Railroad Company has been joined in this action as a nominal party defendant for the sole purpose of preventing your petitioner from removing this cause to the circuit court of the United States." The plaintiff then filed an affidavit stating that he was a citizen of Arkansas, the same State as that — the petitioning defendant. The State court, on the petition and affidavit, found that the plaintiff was a citizen of Arkansas and refused to grant the petition. A few days later the
102 cause came on for trial, and the Kansas City, Memphis and Birmingham Railroad Company was dismissed by plaintiff from the case. The resulting judgment against the other company was carried to the supreme court of Tennessee, and that court affirmed the action of the court below in denying the petition for removal, on the ground that it had power to pass on the issue of fact as to the citizenship of the plaintiff. The Supreme Court of the United States, to which the case was carried on error, held that in this the Tennessee court erred, because all issues of fact were for the circuit court of the United States alone to decide, but that the action of the State court must be affirmed for the reason that, as matter of law, the petition for removal was bad because it was filed after the time for removal as limited in the statute.

In the opinion there is no reference made to the last averment in the petition for removal, that the Birmingham Company had been joined as a nominal party solely to prevent removal, and we can merely supply the obvious reason why such an averment under the circumstances did not remove the objection that the petition for removal came too late. The petition for removal was filed while the Birmingham Company was still a party defendant. The averment that it was joined to defeat removal could have been made as well within the statutory time for removal as when it was made. If the Birmingham Company was merely a nominal party defendant, and this appeared on the face of the declaration, the
103 conduct of the plaintiff did not prevent the seasonable filing of the petition for removal, and there was no room for an estoppel.

If the declaration made a good case against the Birmingham Company, it is difficult to see how the Federal court could hold it to be a nominal defendant and remove the case without trying the merits of the case, and no authority has held that this can be done. It may be truly said, therefore, of the Daughtry case that either the averment as to the joinder of the resident defendant was something which could have been made the basis for a removal within statutory

time or it made no case for removal at all as long as the resident defendant remained a party. The marked distinction between the case at bar and that of Daughtry is that in the latter case no petition for removal was filed after the dismissal of the resident defendant and the change of the cause to a removable form. In this case not only was a petition for removal filed within the statutory time, but a second petition was filed immediately after dismissal of the resident defendant.

We think the conclusion we have reached is a fair and just one. It is often within the power of a plaintiff to deprive a defendant of the right to go into the Federal court by questionable means, which a want of comprehensiveness in the statute prevents the court from defeating; but, as Mr. Justice Miller said on the circuit in the case of Arapahoe County *vs.* Kansas Pacific R'y Co. *et al.*, in speaking of
the constitutional right of persons with requisite citizenship
104 to resort to the Federal courts and the necessity of preserving it, "We must therefore be astute not to permit devices to become successful which are used for the very purpose of destroying that right."

The facts of the present case seem to us clearly to show that there was a device to deprive the Chesapeake & Ohio Railway Company of its constitutional and statutory right to come into this court, and we find no difficulty in defeating the device on principles well supported by decided cases.

The petition for removal is granted, the bond is approved, and the motion to remand is denied.

WM. H. TAFT.

I concur.
JNO. W. BARR.

And on a day following, to wit, on December 9, 1895, came plaintiff, by his attorney, and filed a plea herein; said plea was and is in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Kentucky, at Covington.

JOHN T. POWERS
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY.

Plaintiff says that after the presentation to the Kenton
105 circuit court by defendant, The Chesapeake & Ohio Railway Company, of its petition and bond for removal herein, October 16th, 1894, said defendant presented the question thereby raised to said State court for decision and procured the decision of said State court thereupon, which decision of said State court was against said petition and application for removal, and thereupon said defendant excepted to said decision and judgment of said State court; and thereafter said cause was tried and verdict and judgment rendered against said defendant in said State court, in which trial said de-

fendant took part, and thereupon said defendant, in said State court, filed its motion and grounds for a new trial of said cause in said State court and invoked and had the judgment of said State court thereupon, which judgment overruled said motion; and thereupon said defendant prayed said Kenton circuit court for an appeal to the court of appeals of Kentucky from said judgment against it, which appeal was thereupon granted to it by said State court; and thereafter said defendant, in prosecution of said appeal from said judgment to the court of appeals of Kentucky, did, on the 30th day of October, 1894, in said cause and in said Kenton circuit court, duly execute and give its supersedeas bond superseding said judgment in the following words and figures, namely:

Kenton Circuit Court.

JOHN T. POWERS, Plaintiff,
against
C. & O. R'W'Y Co., Defendant.

106 We undertake that the defendant, The Chesapeake & Ohio Railway Company, will pay to the plaintiff all costs and damages that shall be adjudged against said defendant on the appeal from the judgment of said court rendered October 20th, 1894, for $10,000.00, and interest and costs; also that said defendant will satisfy and perform the said judgment appealed from, if affirmed, and any judgment or order which the appellate court may render or order to be rendered by the inferior court not exceeding in amount or value the said judgment appealed from.

Witness our hands this 30th day of October, 1894.

F. A. PRAGUE.

Attest: H. C. HALLAM, *Clerk*,
By H. K. CONNOLLY, *D. C.*

Said defendant in said bond gave said F. A. Prague as its surety on said bond.

And thereupon said defendant had issued upon and in prosecution of its said appeal had issued and executed a supersedeas of said judgment.

And thereafter, on the — day of ——, 1894, said defendant, in further prosecuting of its said appeal to the court of appeals of Kentucky and solely for the purpose of said appeal, presented to said Kenton circuit court its bill of evidence and exceptions of all the proceedings and rulings of said court had upon the said trial therein of said cause, and procured and had the said State
107 court to sign, approve, and file the same, and make the same part of the record of said cause; all of which was done by said State court.

Said appeal from said judgment of the Kenton circuit court to the court of appeals of Kentucky and the said supersedeas there-

upon are each still pending, undetermined, and in full force and effect.

Plaintiff pleads the foregoing facts in abatement of this cause in this court, and also pleads the same to and against the jurisdiction of this court in this cause, and he says and pleads that because thereof and because this cause was not a removable cause from said State court to this court this court has not jurisdiction of this cause.

And he prays that it may be so held and adjudged.

WM. GOEBEL, *For Plaintiff.*

And on a day following, to wit, on December 10th, 1895, the following motion to defer proceedings was filed herein, and was and is in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Kentucky, at Covington.

JOHN T. POWERS
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY.

Upon and for the facts and reasons set out in the plea of
108 abatement and plea to the jurisdiction of the court filed herein by the plaintiff on December 9th, 1895, the plaintiff moves the court to defer all proceedings in this cause in this court until the termination of the cause in the courts of the State of Kentucky, and in the Supreme Court of the United States, if the cause should be taken thereto from the courts of Kentucky.

WM. GOEBEL, *For Plaintiff.*

And on the same day, to wit, on December 10th, 1895, a motion to remand was filed herein by the plaintiff; said motion was and is in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Kentucky, at Covington.

JOHN T. POWERS, Plaintiff,
against
THE CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

Plaintiff moves the court to remand this cause to the State court upon the grounds and facts and for the reasons set out in the plea in abatement and plea to the jurisdiction herein filed on the 9th day of December, 1895.

WM. GOEBEL,
Attorney for Plaintiff.

109 And on the same day, to wit, on December 9th, 1895, came the defendant, The Chesapeake & Ohio R'y Co., by its attorney, and filed demurrer to said plea; said demurrer was and is in words and figures as follows, to wit:

United States Circuit Court, District of Kentucky, at Covington.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE & OHIO R'Y CO., Defendant.

Now comes The Chesapeake & Ohio Railway Company, defendant herein, and demurs to the plea of abatement filed by the plaintiff herein because the same does not state facts sufficient to oust the jurisdiction of this court.

SIMRALL & GALVIN,
W. H. JACKSON,
Att'ys for Def'ts.

And on a day following, to wit, on December 10th, 1895, an entry was made herein; said entry was and is in words and figures as follows, to wit:

110 JOHN T. POWERS
vs.
THE C. & O. R'W'Y CO.

This cause coming on for hearing on the plea of plaintiff in abatement and to the jurisdiction of this court and on the demurrer of defendant thereto, the court, on consideration thereof, finds said demurrer well taken and sustains same to said plea in abatement and to the jurisdiction of the court; to which ruling plaintiff, by his counsel, comes and excepts.

And thereupon, the cause coming on further to be heard upon the motion of plaintiff to defer all proceedings in this cause in this court until the termination of the cause in the courts of the State of Kentucky and the Supreme Court of the United States, if the case shall be taken thereto from the courts of Kentucky, and the defendant objecting thereto, the court, on consideration, finds said motion not well taken and overrules the same; to which ruling of the court plaintiff, by his counsel, comes and excepts.

And on the same day, to wit, on December 10th, 1895, an entry was made herein; said entry was and is in words and figures as follows, to wit:

111 JOHN T. POWERS
vs.
THE C. & O. R'W'Y CO.

This day came again the plaintiff, by his counsel, and now renews the motion herein to remand the case to the State court. Came the defendant and objected to the filing of said motion—argument being heard—and the court, being advised, is of the opinion that said motion be overruled and it is so ordered; to which ruling of the court plaintiff, by his counsel, comes and excepts.

And on a day following, to wit, on Friday, February 14th, 1896, an entry was made herein; said entry was and is in words and figures as follows, to wit:

JOHN T. POWERS
vs.
THE CHESAPEAKE & OHIO R'W'Y CO.

This cause being this day called for trial, and the plaintiff insisting upon his objection to the jurisdiction of the court, and that the court is without jurisdiction because the cause was never properly removed into this court and should have been remanded to the State court, and declining for that reason to recognize the jurisdiction of this court or to prosecute his action herein, the court overruling all of said objections, and the plaintiff still declining to proceed
112 in this court, and the court being of the opinion that *that* the petition does not state a cause of action, it is now adjudged that the action be, and the same is hereby, dismissed at the cost of the plaintiff; to all of which the plaintiff objects and excepts and files his petition for a writ of error to the Supreme Court of the United States, upon the ground alone that the cause was not properly removed into this court, and that this court is without jurisdiction. Said writ of error is allowed and the question of the jurisdiction of this court is hereby, at the plaintiff's request, certified to the Supreme Court of the United States upon the various proceedings to remove said cause into this court and to remand the same to the Kenton circuit court. Said proceedings and record upon which the question of jurisdiction is so certified to the Supreme Court of the United States upon said writ of error are as follows, to wit: Transcript from Kenton circuit court, filed herein December 4th, 1893; the answer to the petition for removal, filed by the plaintiff December 14, 1893; the amendment to the transcript from the State court, filed by the plaintiff December 14, 1893; the order of January 10th, 1894, remanding the case to the State court; the transcript from the Kenton circuit court, filed herein by the defendant December 3rd, 1894; affidavits of David T. Evans and William D. Boyer, filed by the defendant December 6, 1894; the motion to remand, filed by the
113 plaintiff December 11, 1894; the answer to the petition for removal, filed by the plaintiff December 11th, 1894; the motion for leave to file amended petition and affidavits, filed by the defendants December 22, 1894; the order made by the court December 22, 1894, granting said motion; the amended petition for removal and affidavits of E. W. Fitzgerald and W. D. Boyer, filed by the defendant December 22, 1894; the answer to the petition for removal and amendment thereto, filed by the plaintiff January 2, 1895; the exhibits, original transcript of proceedings had in case No. 1834, filed herein by the defendant January 7, 1895; the order of court made January 7, 1895, overruling a motion to remand the case December 9, 1894; the plea to the jurisdiction and the demurrer to the plea, filed December 9, 1895; the order of the court entered December 10th, 1895, sustaining the demurrer to the plea and overruling the

plaintiff's motion to defer proceedings pending the final determination of the proceedings in the State court; the order of the court made December 10th, 1895, overruling the plaintiff's motion to remand; final judgment aforesaid this day entered.

The petition for writ of error and assignment of errors referred to in the foregoing order was and is in words and figures as follows, to wit:

114 Circuit Court of the United States for the District of Kentucky.

JOHN T. POWERS, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

The plaintiff prays for a writ of error to the Supreme Court of the United States upon the question alone of the jurisdiction of this court and assigns for error:

First. That this court erred in overruling the motion of this plaintiff, filed December 8th, 1894, to remand this cause to the State court.

Second. That this court erred in the order entered December 22nd, 1894, permitting the defendant to file an amended petition for removal and affidavits.

Third. That this court erred in its order made January 7th, 1895, overruling the motion of this plaintiff to remand this cause to the State court.

Fourth. That this court erred in its order entered December 10th, 1895, sustaining the demurrer to plaintiff's plea to the jurisdiction of the court and in overruling plaintiff's motion to defer proceedings pending the final determination of proceedings in the State court.

115 Fifth. That this court erred in its order entered December 10th, 1895, overruling the plaintiff's motion to remand this cause to the State court.

Sixth. That this court erred in entertaining jurisdiction to render the final judgment herein dismissing the petition at plaintiff's costs, and overruling all objections of plaintiff to the jurisdiction of the court.

——— ———,
Attorney for Plaintiff.

And on the same day, to wit, on February 14th, 1896, a writ of error issued herein; said writ of error was and is in words and figures as follows, to wit:

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Kentucky, Greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between John T. Powers, plaintiff, and The Chesapeake & Ohio Railway Company, defendant, a manifest error hath happened, to the great damage of the said John T. Powers, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties
116 aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the second Monday in October next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court, the 14th day of February, 1896, in the year of our Lord one thousand eight hundred and ninety-six.

JOS. C. FINNELL,
Clerk of the Circuit Court of the United States for the District of Kentucky.

Allowed by—
JOHN W. BARR, *Judge.*

And on the same day, to wit, on February 14th, 1896, a bond was filed therewith; said bond was and is in words and figures as follows, to wit:

117 Know all men by these presents that we, John T. Powers, as principal, and John O'Meara, as surety, are held and firmly bound unto The Chesapeake & Ohio Railway Company in the full and just sum of five hundred ($500) dollars, to be paid to the said The Chesapeake & Ohio Railway Company, its successors, certain attorneys, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of December, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas lately, at a term of the circuit court of the United States for the district of Kentucky, at Covington holden, in a suit depending in said court between John T. Powers, plaintiff, and The Chesapeake and Ohio Railway Company, defendant, and numbered 1864

on the docket of said court, a judgment was rendered against the said John T. Powers, dismissing his petition at his costs and overruling his objections to the jurisdiction of said court, and the court certified the question of jurisdiction alone to the Supreme Court of the United States, and the said John T. Powers having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a
118 citation directed to the said The Chesapeake and Ohio Railway Company, citing and admonishing it to be and appear at a session of the Supreme Court of the United States, to be holden at the city of Washington, on the second Monday of October next:

Now, the condition of the above obligation is such that if the said John T. Powers shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

JOHN T. POWERS. [SEAL.]
JOHN O'MEARA. [SEAL.]

Witness:
WM. GOEBEL.

Approved by—
JOHN W. BARR, *Judge.*

And on a day following, to wit, on February 15th, 1896, the following citation to defendant in error was filed herein by the clerk, having been issued by Hon. John W. Barr on February 14th, 1896; said citation was and is in words and figures as follows, to wit:

THE UNITED STATES OF AMERICA, *ss:*

To the Chesapeake & Ohio Railway Company, Greeting:

You are hereby cited and admonished to be and appear
119 at a Supreme Court of the United States, to be holden at the city of Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Kentucky, wherein John T. Powers is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 14th day of February, in the year of our Lord one thousand eight hundred and ninety-six.

JNO. W. BARR, *Judge.*

And upon the said citation appears the following endorsement, viz:

CINCINNATI, *M'ch* 5, 1896.

Service of citation of error in above case accepted this March 5th, 1896.

CHESAPEAKE & OHIO RAILWAY COMPANY,
By CHARLES B. SIMRALL, *Att'y.*

120 THE UNITED STATES OF AMERICA, *ss:*

To the Chesapeake and Ohio Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Kentucky, wherein John T. Powers is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 14th day of February, in the year of our Lord one thousand eight hundred and ninety-six.

JNO. W. BARR, *Judge.*

CINCINNATI, *M'ch 5th*, 1896.

Service of citation of errors in above case accepted this March 5th, 1896.

CHESAPEAKE AND OHIO RAILWAY COMPANY,
By CHARLES B. SIMRALL, *Att'y.*

[Endorsed:] United States circuit court, dist. of Ky. No. 1864. John T. Powers *vs.* C. & O. R'y Co. Citation to defendant in error. Filed Feb'y 15th, 1896. Jos. C. Finnell, clerk. (24.)

121 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Kentucky, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between John T. Powers, plaintiff, and The Chesapeake and Ohio Railway Company, defendant, a manifest error hath happened, to the great damage of the said John T. Powers, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 14th day of February, 1896, in the year of our Lord one thousand eight hundred and ninety-six.

JOS. C. FINNELL,
Clerk of the Circuit Court of the U. S.
for the District of Kentucky.

Allowed by—
JNO. W. BARR, *Judge.*

[Endorsed:] United States circuit court, dist. of Ky. No. 1864. John T. Powers *vs.* C. & O. R'y Co. Writ of error. Filed *filed* Feb'y 15, 1896. Jos. C. Finnell, clerk. (22.)

122 THE UNITED STATES OF AMERICA, } ss:
District of Kentucky, }

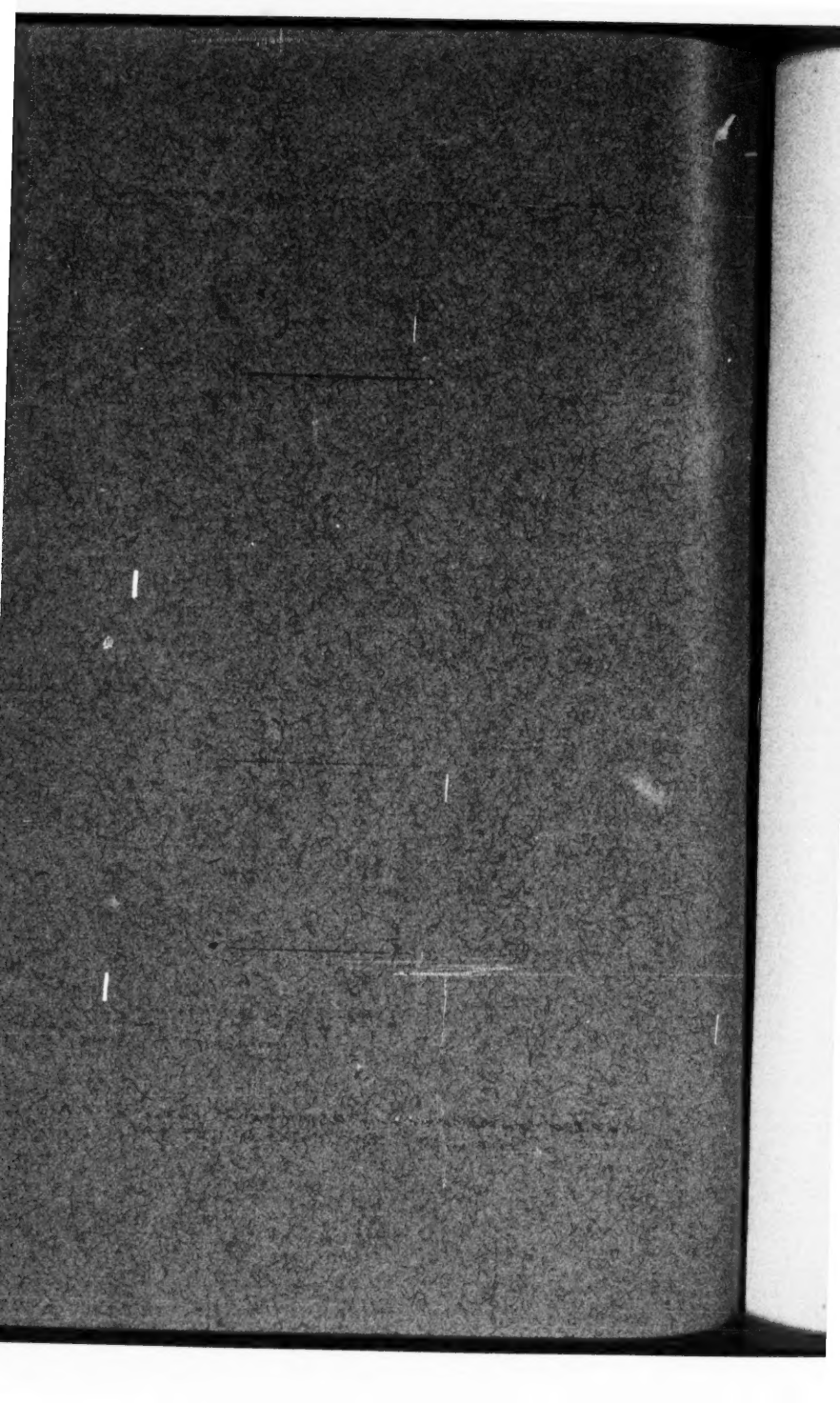
I, Joseph C. Finnell, clerk of the circuit court of the United States within and for the district aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the above-entitled cause as the same appears of record and on file in the clerk's office of said court, and also original writ of error and citation.

Seal 6th Circuit Court, Ky. Dis., U. S. of America.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Covington, Ky., this 6th day of March, A. D. 1896.

JOS. C. FINNELL, *Clerk,*
By L. M. VAN DYKE, *D. C.*

Endorsed on cover: Case No. 16,228. Kentucky C. C. U. S. Term No., 144. John T. Powers, plaintiff in error, *vs.* The Chesapeake & Ohio Railway Company. Filed March 19th, 1896.



SUPREME COURT OF THE UNITED STATES

JOHN T. POWERS,

Plaintiff in Error,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR UPON MOTION TO DISMISS WRIT OF ERROR.

This cause comes in error to the Circuit Court of the United States, for the District of Kentucky. The error complained of is the overruling of a motion to remand to the state court a cause that had been removed from the state court to the United States Circuit Court, for the District of Kentucky, upon the ground of diverse citizenship of parties plaintiff and defendant to the suit.

The case is certified to this Court, by the Circuit Court of the United States, for the District of Kentucky, upon the question of jurisdiction alone, under the provisions of Section 5 of the act of Congress establishing Circuit Courts of Appeal, March 3, 1891, 26 U. S. Statutes, page 827.

This hearing is upon motion filed by defendant in error, to dismiss the proceedings in error herein, because there is no issue of the jurisdiction of the Circuit Court of the United States, for the District of Kentucky, involved therein.

STATEMENT.

On the 14th day of April, 1893, John T. Powers, plaintiff in error herein, brought suit in the Circuit Court of Kenton County, Kentucky, against The Chesapeake & Ohio Railway Company, defendant in error herein, and David Evans, to recover the sum of twenty-five thousand dollars damages, for injuries alleged to have been sustained by the plaintiff in said suit through the alleged negligence of the defendants.

The petition alleged that the individual defendant was the agent and employe of the corporation defendant; that plaintiff's alleged injuries were caused by the negligence of the individual defendant, for which negligence both the individual and corporation defendant were liable.

On the 29th day of April, 1893, The Chesapeake & Ohio Railway Company filed its petition and bond in the state court for the removal of said cause to the United States Circuit Court, for the District of Kentucky, upon the ground of diverse citizenship of parties plaintiff and defendant. The Kenton Circuit Court accepted the petition for removal and approved the bond. The Chesapeake & Ohio Railway Company in due time filed in the United States Circuit Court, for the District of Kentucky, a transcript of the record from the state court.

The plaintiff in the case, John T. Powers, filed in the United States Circuit Court an answer to the petition of removal, controverting the allegations of diverse citizenship of parties plaintiff and defendant to said suit, and moved to remand the case to the state court. The Court heard and determined the question of citizenship in favor of the defendant in the case, and overruled plaintiff's motion to remand. Thereupon plaintiff dismissed his suit.

These facts appear in the opinion of the Circuit Court herein. (Pages 43, 44, and also transcript pages 32 to 43 of the Record).

After dismissing his suit in the United States Circuit Court, the plaintiff, on the 7th day of September, filed a new petition on the same cause of action in the Kenton Circuit Court of Kentucky, in which he made defendants, not only The Chesapeake & Ohio Railway Company and David Evans, who had been defendants in the first suit, but also W. D. Boyer and Edward Hickey, alleging that Boyer was a conductor, Evans an engineer, and Hickey a switchman in the employ of the defendant corporation, that he had been injured by their gross negligence, and asking damages against all of the defendants in the sum of twenty-five thousand dollars. (Rec., page 43).

The Chesapeake & Ohio Railway Company, before its answer was due under the law of Kentucky, filed its petition and bond in the state court for the removal of the case to the United States Circuit Court for the District of Kentucky, alleging that the amount in controversy exceeded, exclusive of interests and costs, the sum of two thousand dollars; that there was a diverse citizenship of parties plaintiff and defendant, The Chesapeake & Ohio Railway Company; that the defendants, Boyer, Evans and Hickey, were fraudulently and improperly joined as parties defendant, for the sole purpose of defeating the right of the petitioner to remove said cause to the United States Circuit Court. (Rec., p. 3). The state court accepted the petition, and approved the bond for removal. (Rec., p. 4).

On the first day of the next term of the United States Circuit Court (December Term, 1893), the petitioner for removal filed in that Court a transcript of the record from the state court. (Rec., p. 1). On the 14th day of December, 1893, the plaintiff, John T. Powers, filed an answer to the petition of removal, denying the allegations of diverse citizenship contained in said petition, and denying that the other defendants in said cause, or any of them, were improperly or fraudulently joined as defendants, for the

purpose of defeating the petitioner's right to remove said case to the United States Circuit Court, and moved to remand the case to the state court. (Rec., pages 4 and 5).

Upon hearing in the United States Circuit Court, the motion to remand was granted and the case was remanded to the state court. (Rec., pages 6, 7, 8, 9, 10, 11, 12, 13, 14, 15).

After the case was remanded to the state court, The Chesapeake & Ohio Railway Company filed its answer in the state court, controverting all the allegations of negligence set up in the petition. (Rec., p. 15).

On the 16th day of October, 1894, the defendant, The Chesapeake & Ohio Railway Company filed an amended answer, setting up the defense of contributory negligence. (Rec., p. 20). To this amended answer plaintiff replied, controverting the allegations of contributory negligence on the part of the plaintiff. (Rec , p. 19).

On the 16th day of October, 1894, after the issues were joined, *the plaintiff, upon his own motion, dismissed the case as to all the defendants, except The Chesapeake & Ohio Railway Company.* The case then stood for the first time a suit involving a controversy wholly and solely between the plaintiff, a citizen of Kentucky, and the defendant, The Chesapeake & Ohio Railway Company, a corporation organized under the laws of Virginia and West Virginia.

The defendant, The Chesapeake & Ohio Railway Company, immediately, on the same day, to-wit: October 16th, 1894, filed in the state court, another petition and bond for the removal of the case to the United States Circuit Court, for the District of Kentucky.

This petition for removal alleged that the amount in controversy exceeded two thousand dollars; that the suit involved a controversy wholly between citizens of different states. It made the allegation of diverse citizenship of parties plaintiff and defendant; that when the suit was

originally brought the plaintiff had fraudulently and improperly joined other parties as defendants, for the purpose of defeating the petitioner's right to remove the cause to the United States Court; that because such of joinder the cause had been remanded to the state court; that the plaintiff had, on the 16th day of October, after the case had been remanded and issue had been joined in the state court, dismissed the suit as to all the defendants, except The Chesapeake & Ohio Railway Company, and that the case on that date, October 16th, 1894, was for the first time a suit pending against The Chesapeake & Ohio Railway Company alone. (Rec., pages 17, 18 and 19).

The state court refused to approve the bond for removal, "*but not for lack of sufficiency thereof*," and refused to remove the case. (Rec., page 17). A jury was, on the same day, October 16th, impanneled. The case was tried, resulting in a verdict against The Chesapeake & Ohio Railway Company in the sum of ten thousand dollars. (Rec., page 21). The company excepted to the verdict, and prayed an appeal to the Court of Appeals, and executed its supersedeas bond to stay execution. (Rec., page 25).

On December 3d, 1894, the first day of the December Term, 1894, of the Circuit Court of the United States, the said term being the first term of said Court after the filing in the state court of the petition for removal of the cause to the United States Circuit Court, The Chesapeake & Ohio Railway Company filed in said Circuit Court of the United States, a transcript of the record in the state court. (Rec., page 7).

On the 8th day of December, 1894, the plaintiff moved the Court to remand the case to the state court.

The grounds of the motion to remand were:

First. That the case was not removable from the state to the federal court.

Second. That the petition and bond were not filed within the time fixed by law for the filing thereof.

Third. That the question raised by the petition for removal had theretofore been adjudicated by the United States Circuit Court, and such adjudication was relied on in bar to the last removal proceeding. (Rec., page 27).

The plaintiff filed answers to the petition for removal, but did not controvert the allegations of jurisdictional amount, and diverse citizenship of parties plaintiff and defendant. (Rec., pages 28, 31). The only issue made was as to fraudulent conduct of plaintiff in state court, which prevented an earlier filing of the petition for removal in the state court. Two affidavits were filed (Rec., pages 26, 27) and the transcript of the record in the first removal suit. (Rec., pages 32 to 43 inclusive). Upon the issue thus joined, the motion to remand was submitted, on the pleadings and evidence.

On January 7th, 1895, the Court overruled the motion to remand, upon the ground that the plaintiff had, by fraudulent devices and conduct, in the state court, prevented the defendant from filing his petition for the removal of the cause to the United States Circuit Court prior to the day on which it was filed, and that therefore the plaintiff was estopped from objecting to the time of its filing. (See Opinion of Court, Rec., pages 43 to 54). The Court then approved the bond for removal which had been tendered by the defendant in the state court.

On December 9th, 1895, the plaintiff filed in the case a plea in abatement to the defendant's right to maintain the case in the United States Circuit Court. This plea in abatement set out that, after defendant had filed its petition and bond for removal in the state court, and after the state court had refused to approve the bond or order the removal, that defendant excepted to said order, and that thereafter the cause was tried and a verdict and judgment rendered against the defendant in the state court; that the defendant took part in said trial; filed in the state court

its motion for a new trial; prayed an appeal to the Court of Appeals of Kentucky; executed a supersedeas bond, superseding the judgment in the state court; presented its bill of exceptions to the state court, and had the Court approve and sign the same, which facts the plaintiff plead in abatement of the cause in the Circuit Court of the United States and against the jurisdiction of said Court. (Rec., pages 55 and 56).

On December 10th, 1895, the plaintiff filed a motion to remand the case to the state court, basing said motion upon his plea in abatement, and at the same time filed a motion that all further proceedings in the case in the Circuit Court of the United States be delayed until the final termination of the case in the state courts of Kentucky. (Rec., page 56).

The Chesapeake & Ohio Railway Company demurred to plaintiff's plea in abatement, which demurrer was sustained by the Court, the plaintiff excepting. The Court overruled the motion to defer proceedings. (Rec., pages 56 and 57).

On December 10th, 1895, the plaintiff renewed his motion to remand the case to the state court, which motion the court overruled, plaintiff excepting.

On February 14th, 1896, the case was called for trial in the Circuit Court of the United States for the District of Kentucky. The plaintiff still insistiug upon his objection to the jurisdictiou of the Court, declined to recognize such jurisdiction or to prosecute his suit in said Court, or to proceed further with said cause in said Court, and the Court being of opinion that the plaintiff's petition did not state a good cause of action, adjudged that the action be dismissed at plaintiff's costs, to which ruling plaintiff excepted, and filed his petition for a writ of error to this Court upon the ground alone that the case was not properly removed from the state court to the United States Cir-

cuit Court for the District of Kentucky, and that the United States Circuit Court for the District of Kentucky was without jurisdiction over said cause.

The writ of error was allowed, and the cause was certified to this Court *upon the question of jurisdiction alone.* (Rec., page 58),

---

The defendant in error contends:

That there is no jurisdictional question raised in this case, such as will justify, or permit this court, under Section 5 of the act establishing Circuit Courts of Appeal, 26 U. S. Statutes, 827, to entertain these proceedings in error, or to review the judgment of the Circuit Court in this cause.

The record in the case shows that there is no dispute upon the following points:

1st. That when the defendant in error filed its petition in the state court for the removal of the case to the Circuit Court of the United States, (to-wit, on October 16, 1894,) the amount in controversy was sufficient to warrant the removal.

2d. That when the defendant in error filed its petition for removal in the state court (to-wit, October 16, 1894,) the controversy in the suit existed wholly between citizens of different states, that is, between the plaintiff in the case, who was a citizen of the state of Kentucky, and the defendant, which was a corporation organized under the laws of the states of Virginia and West Virginia.

In neither of the answers filed by the plaintiff in error, in the Circuit Court of the United States, to the petition for removal, are the allegations of jurisdictional amount, or diverse citizenship of parties plaintiff and defendant, controverted. (See answers, Rec., p. 28, 31).

The jurisdictional questions, of amount in contro-

versy, and diverse citizenship of parties plaintiff and defendant, stand conceded.

It follows, the jurisdictional question of amount being admitted, and the jurisdictional question of citizenship being admitted, that the only question that remains for the consideration of the Court is, whether or not the petition for removal was filed in the state court in proper time.

The determination of this question does not, we submit, involve a question of *jurisdiction*, but only a question of mode or procedure that may be controlled by the conduct of the parties to the suit.

The Court, in passing upon such a question, and in deciding what effect or weight shall be given to the acts or conduct of the parties to the suit, affecting the removal of a particular case, must determine the questions according to the same principles of law that guide the Court in construing any other act or conduct of parties litigant, which arises before or during the progress of a trial. Such a judgment of the Court may involve error, which will be the subject of review in an appellate court, but such a question is not one that affects the jurisdiction of a court that is established by statutory enactment, and which can neither be broadened nor narrowed by any act or conduct of parties litigant.

This Court, in construing the removal act, has frequently held that part of said act was purely jurisdictional, and part was modal or formal.

That the jurisdictional conditions *are indispensable, and must be shown by the record.*

That the modal or formal part of the statute, while, to a certain extent obligatory, may be waived.

Ayers v. Watson, 113 U. S., 595.
Northern Pac. R. R. v. Austin, 135 U. S., 315.
Gerling v. Balt. & Ohio R. R., 151 U. S., 673.

This Court, through Mr. Justice Bradley, in the case of Ayers v. Watson, 113 U. S., 595, draws the distinction clearly between questions of jurisdiction and questions of procedure:

> "Diverse citizenship of the parties, or some other jurisdictional fact prescribed by the second section, is absolutely essential and can not be waived, and the want of it will be error at any stage of the cause, even though assigned by the party at whose instance it was committed. Mansfield & Coldwater Ry. Co. v. Swan, 111 U. S., 379. Application in due time and proffer of proper bond, as required by the third section, are also essential if insisted on, but, according to ordinary principles which govern such cases, may be waived, either expressly or by implication. We see no reason, for example, why the other party may not waive the required bond, or any informalities in it, or any informalities in the petition, provided it states the jurisdictional facts, and if these are not properly stated, there is no good reason why an amendment should not be allowed so that they may be properly stated. So it seems to us there is no good reason why the other party may not also waive the objection as to the time within which the application for removal is made. It is not in its nature a jurisdictional matter, but a mere rule of limitation.
>
> In some of the older cases the word jurisdiction is often used somewhat loosely, and, no doubt, cases may be found in which this matter of time is spoken of as affecting the jurisdiction of the Court. We do not so regard it, and since the removal was affected at the instance of the party who now makes the objection, we think that he is estopped."

Practically the same point was decided in French v. Stewart, 22 Wall., 238.

In the case of Gerling, admr., etc., v. Balt. & Ohio R. R., 151 U. S., 673, this Court emphatically held, that the time of filing a petition in the state court for the removal of a cause to the United States Circuit Court, is not a fact in its nature essential to the jurisdiction of the national court, and that the objection as to the time of filing of petition may be waived, by the conduct of parties to the cause.

In the case cited, a removal had been taken from the state to the national court. After the case had proceeded to trial in the national court, the objection was made that the petition for removal had been filed too late in the state court, and that, therefore, the United States Court *obtained no jurisdiction* by the filing of the record in that Court.

This Court, in passing upon the question, finds that the petition for removal had been filed too late in the state court; but it also held that the plaintiff in the cause, by going to trial in the national court, had waived its right to objection upon that point. The Court, through Mr. Justice Gray, says:

> "The question therefore arises whether the objection to the time of filing of the petition for removal can be raised for the first time in this Court, or must be held to have been waived by not taking it below.
>
> "The time of filing the petition for removal of a case from a state court into the Circuit Court of the United States for trial is not a fact in its nature essential to the jurisdiction of the national court, under the Constitution of the United States, like the fundamental condition of a controversy between citizens of different states. But the direction as to the time of filing the petition is more analogous to the direction that a civil suit within the original jurisdiction of the Circuit Court of the United States shall be brought in a certain district, a non-compliance with which is waived by a defendant, who does not seasonably object, that the suit is brought in the wrong district."

Mr. Justice Gray reviews fully the case of Ayers v. Watson, 113 U. S., 595, above cited, and the reasoning of Mr. Justice Bradley in the case. He approves both the reasoning and decision of the case in the following language:

> "His whole course of reasoning leads up to the conclusion that the time of removal, not being a jurisdictional and essential fact, is the subject of waiver and estoppel alike." * * *
>
> "The decision in Ayers v. Watson (113 U. S., 595), as to the waiver in the Circuit Court of the United States of the objection that the petition for removal had not been seasonably filed in the state court, has never been doubted or qualified."

And finally says the Court:

> "The result is, that an objection to the exercise by the Circuit Court of the United States of jurisdiction over a case otherwise removable, upon the ground that the petition for removal was filed too late, is an objection that may be waived, and that it has been waived in the case at bar."

Gerling v. Balt. & Ohio R. R., 151 U. S., 691.

While it is true that, under the decision last cited, the waiver of the objection to the filing of a petition for removal arose from the conduct of the parties to the suit in the Circuit Court of the United States, in failing to make objections seasonably in that Court; yet the principle established is, that the objection to the petition for removal in the state court, upon the ground that it was not filed in due time, does not raise a jurisdictional question or put in issue the jurisdiction of the national court.

The reason for the rule is clearly stated by Mr. Justice Gray, in Gerling v. Balt. & Ohio R. R. Co., above cited, in reviewing the decision of Mr. Justice Bradley in the case of Ayers v. Watson:

"In that case, it is true, it was the party who had removed the case into the Circuit Court of the United States who afterwards objected to the jurisdiction of that court, because the removal was not in time, and was estopped to do so. But if due time of removal had been made, by act of Congress, a jurisdictional fact, neither party could waive or be estopped to set up the want of it; but, as has been observed by Mr. Justice Bradley in the passage above quoted, and directly adjudged in Mansfield & C. Ry. Co. v. Swan (111 U. S., 379), cited by him, the fact would be absolutely essential, and the want of it would be error at any stage of the cause, even though assigned by the party at whose instance it was committed."

Gerling v. Balt. & Ohio R. R., 151 U. S., 690.

A jurisdictional fact can not be waived.

Mansfield, etc., R. R. v. Swan, 111 U. S., 379.

Metcalf v. City of Watertown, 128 U. S., 586.

If a fact or a question can be *in any way*, or *in any manner* waived, such fact or question is not a jurisdictional fact or question.

If the question raised in this case is not a jurisdictional question, then the question of jurisdiction of the United States Circuit Court in this case, *is not* "*in issue.*"

Proceedings in error lie directly from the Circuit Court to this Court only in a case, "in which the jurisdiction of the Court is in issue." (26 U. S. Stat., 827).

We might here rest the case for the defendant in error, in confidence that the proceedings in error must be dismissed as not involving a jurisdictional question, but it may be said that the plaintiff in error did raise the objection in the Circuit Court of the United States, that the petition for removal had not been filed in time in the state court, and that therefore he had not waived his objection, and is not now estopped on that question. This is begging the question. It raises *an issue of fact* as to whether or not

the plaintiff in error had in fact by his conduct waived his right to object to the filing of the petition for removal in the state court. This question of fact was decided by the Circuit Court adversely to the plaintiff in error. It may have been an erroneous judgment of the Circuit Court (although we think it a most righteous judgment), to which error might have been prosecuted. Such error can not, however, be prosecuted to this Court. Error would lie only (on such a question) to the Circuit Court of Appeals, which Court, under Section 6 of the act creating Court of Appeals (26 U. S. Stat., 827), has final and exclusive jurisdiction upon all questions decided by the Circuit Court, excepting those involving the jurisdiction of that Court. Many questions may arise in a removal suit upon motions to remand to the state court, that will not put in issue the jurisdiction of the Court. To illustrate:

The Circuit Court may be required to determine, upon evidence, the question of fact as to the diverse citizenship of the parties plaintiff and defendant. Will it be contended that the decision of the Court, upon such an issue of fact, is reviewable *by this Court* as involving the jurisdiction of the Court? Again, in order to remove a case, a separate controversy must exist. The existence of a separate controversy must be determined by the allegations of the petition for removal. Such a determination is simply the construction of a pleading. Can it be contended that the ruling of the Court upon this question of construction will involve a question of the jurisdiction of the Circuit Court, that is reviewable by proceedings in error *to this Court*? Again, the question may arise, as in this case, that the plaintiff in the state court had been guilty of such fraudulent conduct as estopped him from objecting to the filing of the petition for removal out of time. The Circuit Court of the United States might, upon such an issue of fraud, hear evidence and pass upon the question of fraud, as the Court in this case did upon affidavits and other evidence. If the

correctness of the ruling of the Circuit Court, upon the issue thus made can be construed as raising an issue of jurisdiction, then this Court may be called upon at any time to review the judgment of the Circuit Court upon an issue of fact.

The jurisdictional facts must appear from the record, in this case from the petition for removal, which, if uncontroverted, establishes jurisdiction. The other questions are questions of fact that arise from *a denial of the allegations of the petition* for removal. The Court may err in deciding these questions of fact, which error is reviewable in a proper way, but behind such questions is the *undeniable, uncontroverted fact that the jurisdiction of the Circuit Court in this case depends entirely upon the citizenship of the parties to the suit, and that there is no issue in the case upon that question.* Can it be contended that the jurisdiction so obtained can be made dependent upon evidence of *other facts* relating to any act, or agreement of consent, dissent, waiver, or estoppel of the parties litigant?

Section 6 of the act of Congress creating the Circuit Courts of Appeal provides that the judgment and decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction of the Court is dependent entirely upon the opposite parties to the suit being citizens of different states, except as is provided in Section 5 of said act. One of the exceptions of Section 5 is where the jurisdiction of the Circuit Court is at issue in the case.

Construing these sections, this Court has held that:

> "Where the requisite citizenship of the parties appears and the subject matter is such that the Court is competent to deal with it, the jurisdiction of that Court attaches. If any error is committed in the exercise of such jurisdiction, it can only be remedied by an appeal to the Circuit Court of Appeals."
>
> Smith v. McKay, 161 U. S., 355.

This case is decisive, we think, of the case at bar.

In the cited case a suit in equity was brought in the United States Circuit Court, for the District of Massachusetts, by a citizen of the state of Rhode Island, against citizens of the state of Massachusetts, alleging a lease, by the complainant to the defendant, of certain patented devices; a failure upon the part of the defendant to comply with the terms of the lease, with a prayer for discovery, accounting, payment of rent, and for an injunction restraining the defendants from using the patented machine until they had fully paid the amount found due. The defendants filed an answer, responding to the allegations of the bill, and averring that the complainant had a plain, adequate and complete remedy at law. Defendants also filed a special motion to dismiss the bill, upon the ground that the United States Circuit Court had no equitable jurisdiction of the case.

The Court overruled the motion to dismiss, ordered an account, and upon final hearing rendered a judgment for complainant in the sum of five thousand dollars.

From this decree an appeal was allowed from the Circuit Court to this Court, upon the question of the jurisdiction of the Circuit Court alone. And the case was so certified.

A motion was made in this Court to dismiss the appeal, because there was no right of appeal to this Court in a case such as was presented by the record.

The Court, after stating that the case had been certified to this Court, upon an issue of jurisdiction alone, under Section 5 of the act of March 3, 1891, and after stating the appellee's ground for the motion to dismiss the appeal, i. e., that the controversy did not involve an issue of jurisdiction of the Circuit Court, Mr. Justice Shiras delivering the opinion, says:

> "We regard this as a second exposition of the law, and applied to the case now in hand demands a

dismissal of the appeal, on the ground that the objection was not to the want of power in the Circuit Court to entertain the suit, but to the want of equity in the complainant's bill. The appellant's contention in this respect would require us to entertain an appeal from the Circuit Court in every case in equity in which the defendant should choose to file a demurrer, on the ground that there was a remedy at law.

"When the requisite citizenship of the parties appears, and the subject matter is such that the Circuit Court is competent to deal with it, the jurisdiction of that Court attaches, and whether the Court should sustain the complainant's prayer for equitable relief, or should dismiss the bill with leave to bring an action at law, either would be a valid exercise of jurisdiction. If any error was committed in the exercise of such jurisdiction, it could only be remedied by an appeal to the Circuit Court of Appeals."

Smith v. McKay, 161 U. S., 359.

To the same effect are the following cases:

Borgmeyer v. Idler et al, 159 U. S., 408.

Colorado Mining Co. v. Turck, 150 U. S., 138.

Ex parte Jones, 164 U. S., 691.

In the case at bar, we submit, the citizenship of the parties appears — the jurisdictional amount is conceded. By the filing of the transcript in the United States Circuit Court the jurisdiction of that Court attached, and its judgment, upon the pleadings, evidence and motion to remand, was a valid exercise of jurisdiction, that can only be reviewed by proceedings in error to the Circuit Court of Appeals.

We respectfully submit that the writ of error in this case should be dismissed.

CHARLES B. SIMRALL,
Attorney for Defendant in Error.

No. 144.

Reply Brf. of Sinnott for A

Filed Nov. 15, 1897.

144

SUPREME COURT OF THE UNITED STATES

JOHN T. POWERS,
Plaintiff in Error.

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
Defendant in Error.

Reply to Brief of Plaintiff in Error on Motion to Dismiss Writ of Error.

The only part of the brief of the plaintiff in error that we deem it necessary to notice is the concluding part, which states that the petition for removal was defective, because it did not show the citizenship of either Boyer, Hickey or Evans, and indeed did not mention the name of Boyer.

This question was considered by the Circuit Court, and we can not present a stronger argument than the reply of the Circuit Court to the objection.

"But it is said that the petition for removal is defective, in that it does not aver that Boyer was fraudulently joined as a defendant and subsequently dismissed.

The petition for removal stated the necessary jurisdictional facts, namely, the diverse citizenship, the jurisdiction, amount, and averred that removal within statutory time had been prevented by fraud of plaintiff. It is true that in mentioning the names of defendants who were al-

leged to have been joined fraudulently in order to defeat the jurisdiction of the federal court and to have been dismissed after serving this purpose, Boyer was by an evident mistake omitted, but this was merely an omission to state all the evidential facts on which the claim of fraudulent estoppel was based, but it did not destroy the legal sufficiency of the petition to show an estoppel. It is settled beyond controversy that it is not for the state courts to pass upon the facts involved in the averments of a petition for removal. It can only deny an application to remove when, as a matter of law on the face of the petition and facts disclosed by the record, the right does not exist.

Kansas City, Ft. Scott & Memphis R. R. Co. v. Daughtry, 138 U. S., 298; Crehore v. Ohio & Mississippi Ry. Co., 131 U. S., 240; Burlington, Cedar Rapids, etc., Railway v. Dunn, 122 U. S., 513; Carson v. Hyatt, 118 U. S., 279.

An examination of the record in this case would have shown the joinder of Evans, Hickey and Boyer, the averment in the first petition for removal that they had all been fraudulently joined to defeat removal, and their subsequent dismissal from the case. This is a case, therefore, where an amendment to the petition for removal can be permitted in this court to state more fully and exactly all the facts upon which the removal was prayed, because the ultimate jurisdictional facts are correctly stated, and the detailed facts concerning the fraud, though imperfectly stated in the petition for removal, all appear in the record. Carson v. Dunham, 121 U. S., 421, 427; Ayers v. Watson, 113 U. S., 594, 598; Crehore v. Ohio & Mississippi R. R. Co., 131 U. S., 240; Jackson v. Allen, 132 U. S., 27; Martin's Adm'r v. Baltimore & Ohio R. R., 151 U. S., 673, 691. It is true, also, that there is in the petition no direct statement that the reason why the joinder of Hickey and and Boyer defeated the jurisdiction of the federal court was, because they were citizens of the same state as the

plaintiff, though this is a necessary inference from the averments made; but it does appear from the ruling of this court on the first petition for removal, which was made a part of the record in the state court, that it was then admitted by both plaintiff and defendant that Boyer and Hickey were citizens of Kentucky, and that for this reason the motion to remand was granted. Defendant has been given leave to amend its petition for removal to restate the facts as above suggested and an amended petition has been filed." (Record, pp. 46, 47.)

The amendment permitted by the court was filed (see Rec., page 29), and shows that by pure clerical error of the draftsman the name of Evans was substituted for Boyer, thus causing Boyer's name not to appear in the petition for removal. It certainly was not error to permit the correction of such a mistake.

Respectfully submitted,

C. B. SIMRALL,

Attorney for Defendant in Error.

No. 144.

Brief of Maxwell v Goebel for P. E. (on ans.)

Filed Nov. 15, 1897.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 144.

JOHN T. POWERS, *Plaintiff in Error*,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,

Brief for Plaintiff in Error in Opposition to the Motion to Dismiss.

Printed by JAMES BARCLAY, 108-110 Canal St., Strobridge Building, Cincinnati, O.

Supreme Court of the United States,

OCTOBER TERM, 1897.

No. 144.

JOHN T. POWERS, *Plaintiff in Error*,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY.

Brief for Plaintiff in Error in Opposition to the Motion to Dismiss.

The state court refused to relinquish jurisdiction. The Circuit Court of the United States insisted on assuming jurisdiction. Both courts have rendered final judgment on the merits, the state court in favor of the plaintiff, the federal court in favor of the defendant. Objection was duly made in the circuit court to its assumption of jurisdiction. And yet the defendant in error says that the jurisdiction of that court is not in issue, and on that ground moves to dismiss the writ of error.

We submit that the case is the very one provided for by the first clause of section 5 of the act of March 3, 1891. It is a case in which the jurisdiction of the Circuit Court of the United States, as a federal court, to render the final judgment complained of, is in issue, and the plaintiff having elected to test the question of jurisdiction alone, has sued out a writ of error to this court.

In the nature of things the controversy presented by this record, involving as it does a contest between the courts of a state and of the nation, can be settled nowhere but in this supreme judicial tribunal of the nation.

The provision of the act of March 3, 1891, allowing writs of error from the circuit courts direct to this court in cases in which the jurisdiction of the circuit court is in issue was adopted from the act of February 25, 1889, c. 236, which was passed for the express purpose of restoring to this court the jurisdiction to review the action of the circuit courts on removal proceedings, which had been taken away by the act of March 3, 1887, c. 373, as corrected by the act of August 13, 1888, c. 866.

The act of February 25, 1889, c. 236, provided that in all cases where a final judgment or decree should be rendered in a circuit court of the United States in which there was "a question involving the jurisdiction of the court," the party against whom the judgment or decree was rendered should be entitled to an appeal or writ of error to this court, without reference to the

amount of such judgment or decree, but where it did not exceed the sum of $5,000, the question of jurisdiction should alone be reviewable. In Richmond & Danville Railroad vs. Thouron, 134 U. S. 45, it was held that there could be no review under the act of February 25, 1889, prior to final judgment, but it was assumed that a motion to remand to the state court raised a question involving the jurisdiction of the circuit court within the meaning of that act.

So also in Chicago, St. Paul, Minneapolis & Omaha Railway vs. Roberts, 141 U. S. 690, which arose under section 5 of the act of March 3, 1891, while it was held that this court had no jurisdiction under that act to review an order of the circuit court remanding a case to the state court, in advance of the final judgment on the merits, the opinion concludes with the observation that "by the motion to remand the jurisdiction of the circuit court was put in issue."

A motion in a circuit court of the United States to remand a case that has been removed from a state court necessarily puts "in issue" the "jurisdiction" of the circuit court, as a federal court, and if the unsuccessful party elects to test the question of jurisdiction alone his remedy is by writ of error direct to this court.

In Smith vs. McKay, 161 U. S. 355, relied upon by opposite counsel as conclusive upon the question at bar, no question was raised by either party as to the jurisdiction of the circuit court, *as a federal court*. That was conceded by both parties. The question was simply whether the case was cognizable at law or in equity.

But at bar the question of jurisdiction relates to the jurisdiction of the court below, as a federal court, in a contest for exclusive jurisdiction between it and the state court.

The argument of opposite counsel is really addressed to the merits of the case, in other words to the jurisdiction of the circuit court, and not to the jurisdiction of this court to review the judgment of the circuit court. They insist that because Powers and the Railway Company are citizens of different states, the Railway Company had a right to remove the case upon the grounds alleged in its petition for removal, although the time prescribed by the Act of Congress for removing the case had long expired. But that is the very question for decision here when the case comes on to be heard on its merits. And if this court shall then hold that the petition for removal was not filed in time or was otherwise defective, its reversal of the judgment of the circuit court will be upon the ground that that court was without *jurisdiction* to render the final judgment brought under review.

Or, suppose we had followed our adversary's advice, and had taken this writ of error to the Circuit Court of Appeals instead of to this court, and that the Circuit Court of Appeals had reversed the judgment for error on the part of the circuit court in overruling the motion to remand. The reversal would have been on the ground that the circuit court had erred in refusing to remand the case, and that it was therefore without *jurisdiction* to render the final judgment. In whatever

court the question is presented it remains a question of the *jurisdiction* of the circuit court to render the final judgment complained of.

The motion to dismiss is not coupled with a motion to affirm under rule 6. We do not therefore discuss the question of the jurisdiction of the *circuit* court. It is enough, for the purposes of the present motion, to know that its jurisdiction, as a federal court, is in issue. But we can not refrain from observing that the petition for removal was not only out of time, but clearly defective in other respects. It did not show the citizenship of either Boyer, Hickey or Evans. Indeed it did not mention Boyer's name. And while it indulged freely in adjectives, it alleged no *facts* to show that Evans and Hickey "were fraudulently and improperly joined as defendants." Even on the defendants' view of the law it fell far short of presenting on the face of the record a case which required the state court to "proceed no farther." Crehore vs. Ohio & Mississippi Railway Co., 131 U. S. 240. And if the doctrine of estoppel is to be invoked it reacts on the defendant, for after filing its petition for removal, it tried the case on its merits in the state court and took an appeal on the merits to the Court of Appeals of Kentucky, and gave a supersedeas bond.

No exception is taken, or indeed can be, to the form of the present appeal, which was granted solely upon the question of the jurisdiction of the circuit court, accompanied by the proper certificate within the rulings

in Shields vs. Coleman, 157 U. S. 168; In re Lehigh Mining Co., 156 U. S. 322, and Smith vs. McKay, 161 U. S. 355, 357.

We respectfully submit that the motion to dismiss should be overruled.

LAWRENCE MAXWELL, JR.,
Counsel for Plaintiff in Error.

WM. GOEBEL,
ALFRED MACK,
Of Counsel.

No. 144.

Brief of Maxwell v. Goebel

C. C.

Filed Nov. 29, 1897.

Supreme Court of the United States,

OCTOBER TERM, 1897.

No. 144.

JOHN T. POWERS, *Plaintiff in Error,*

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY.

In Error to the Circuit Court of the United States for the District of Kentucky.

BRIEF FOR THE PLAINTIFF IN ERROR.

Printed by JAMES BARCLAY, 103-113 Canal St., Strobridge Building, Cincinnati, O.

Supreme Court of the United States,

OCTOBER TERM, 1897.

No. 144.

JOHN T. POWERS, *Plaintiff in Error*,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY.

In Error to the Circuit Court of the United States for the District of Kentucky.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

On September 7, 1893, the plaintiff commenced his action by filing a petition in the Kenton Circuit Court at Independence, Kentucky, against the Chesapeake & Ohio Railway Company, William D. Boyer, David Evans and Edward Hickey (Rec. 1). The summons was served on the Chesapeake & Ohio Railway Company September 26, 1893 (Rec. 5). It was also served on the defendants Boyer and Evans. Hickey was returned not found (Rec. 6). On October 14, two days before its answer was due, the Railway Company filed its petition for removal to the Circuit Court of the United States (Rec. 3). The petition was based upon the ground that there was a separable controversy be-

tween the plaintiff and the Railway Company, the plaintiff being alleged to be a citizen of Kentucky, and the Railway Company a citizen of Virginia and West Virginia, and also upon the ground that the defendants Boyer, Evans and Hickey were "fraudulently and improperly joined as parties defendants for the sole purpose of defeating the right of the petitioner to remove to the United States Circuit Court." The state court, on November 6, approved the Railway Company's bond for removal, and on December 4 the Company filed a transcript in the Circuit Court of the United States (Rec. 1). On December 14, the plaintiff filed in the Circuit Court of the United States an answer to the petition for removal, in which he denied that there was a separable controversy, and also that the defendants Boyer, Evans and Hickey, "or any of them, were fraudulently or improperly joined as parties defendant for the purpose of defeating the pretended right of removal of the defendant, the Chesapeake & Ohio Railway Company, to the United States Circuit Court" (Rec. 4). On December 18, the case was heard on the plaintiff's motion to remand (Rec. 6), and on January 10, 1894, the court sustained the motion and remanded the case to the state court (Rec. 6). On February 6, 1894, the Railway Co. filed in the state court its demurrer and answer to the petition (Rec. 15). On October 16, 1894, the case, on motion of the plaintiff, was discontinued except as to the Railway Company, its demurrer to the petition was overruled and the plaintiff filed a reply. Thereupon the Railway Company filed a second petition for removal, based upon the same grounds as its former petition, to wit: that there was a separable controversy between the plaintiff and the Railway Company, and that "in the bringing of this suit heretofore on the— day of ——, 189—,

David Evans and Edward Hickey were fraudulently and improperly joined as parties defendant for the purpose of defeating the right of your petitioner to remove this cause to the United States Court." The petition further alleged that the suit as to Evans and Hickey was dismissed on October 16, 1894, and "that the said cause is now for the first time pending as to the said Chesapeake & Ohio Railway Company alone" (Rec. 17). The court declined to approve the removal bond. The defendant filed an amended answer which was traversed of record and the case proceeded to trial before a jury, resulting in a verdict and judgment for $10,000 (Rec. 17, 21). On December 3, 1894, the Railway Company filed in the Circuit Court of the United States a second transcript from the state court (Rec. 7). On December 8, the plaintiff filed a motion to remand to the state court upon the ground "that the cause was not removable; that the petition and bond for removal were not filed within the time fixed by law for the filing thereof; and that the question sought now to be made by the second petition for removal has been heretofore adjudicated by this court and said former adjudication is relied on in bar of this second removal proceeding" (Rec. 27). The plaintiff also filed an answer to the petition for removal denying that the defendants, Evans and Hickey, or either of them, were joined as parties defendant, either fraudulently or improperly, or for the purpose of defeating the alleged right of removal of the defendant the Chesapeake & Ohio Railway Company (Rec. 28). On December 22, 1894, the Railway Company, by leave of the Circuit Court of the United States, over the plaintiff's objection, filed therein an amendment to its second petition for removal (Rec. 28, 29). The amendment alleged that "in the bringing of the original suit herein, to wit: on the 7th day

of September, 1893, W. D. Boyer and Edward Hickey were fraudulently and improperly joined as parties defendant in the suit and for the sole purpose of defeating the right of your petitioner to remove this case to the United States Circuit Court;" that said Boyer and Hickey were, at the commencement of the suit, and ever since, have been citizens of Kentucky, and Evans a citizen of Virginia; that the Railway Company had inadvertently and by mistake written in its petition for removal the name of David Evans, when it was intended to write the name of William D. Boyer; and that "by reason of the said improper and fraudulent joinder of said Boyer and Hickey, which it avers was for the sole purpose of defeating the jurisdiction of the United States Court, the plaintiff is estopped by its fraudulent and improper conduct from now asserting that its said petition for removal was not filed within the time required by law" (Rec. 29). On January 2, 1895, plaintiff filed an answer to the petition for removal and amendment thereof, denying the charges of fraud (Rec. 31). On January 7, 1895, the court overruled the plaintiff's motion to remand to the state court (Rec. 43). The plaintiff also filed a plea to the petition for removal (Rec. 54), to which the Railway Company demurred (Rec. 57), which demurrer was sustained (Rec. 57).

The plaintiff has elected to test the question of jurisdiction alone, and brings the case direct to this court on an appropriate certificate (Rec. 58).

ASSIGNMENT OF ERROR.

The circuit court erred in allowing the Railway Company's second petition for removal and in refusing to remand the case to the state court, and was without jurisdiction to render the final judgment brought under review.

ARGUMENT.

The circuit court sustained its jurisdiction under the second petition for removal, and refused to remand the case to the state court, on the ground that the joinder of the individuals as defendants "was a mere device to defeat a removal by the non-resident defendant within the statutory time and with no purpose of ever pushing the case to judgment against the others," and that "the plaintiff ought not to be allowed to take advantage of a delay in removal which his own fraud brought about, and that he must be estopped to use that delay as an objection" (Opinion, Rec. 48). The court freely conceded that if the individuals had been originally joined as defendants bona fide, their subsequent dismissal "by the court or otherwise" after the time allowed by the statute for removing the case, would not give the Railway Company a right to remove against the plaintiff's objection (Opinion, Rec. 52). The decision was placed upon the ground that the original joinder of the individuals was fraudulent.

1. The first and most obvious answer to this position is not only that a petition for removal on that ground, as on any other, must be filed within the time prescribed by the statute, as held in Kansas City Railroad vs. Daughtry, 138 U. S. 298, but that such a petition had been duly filed by the Railway Company and heard and overruled in the circuit court, and the case remanded to the state court, and the Railway Company's remedy was by writ of error to this court. It had no right to file a second petition for removal on that ground, and the state court was not required to yield its jurisdiction upon such second petition. The claim that the individuals had been joined fraudulently had been adjudicated.

2. The second petition for removal, if it had been filed in time, was fatally defective, because it did not, on the face of the record, show a removable case. But unless that is shown the state court is not bound to surrender its jurisdiction and proceed no further. Crehore vs. Ohio & Mississippi Railway Company, 131 U. S. 240.

(a) The petition did not allege the citizenship of either Evans, Hickey or Boyer; indeed it did not mention Boyer's name. The Railway Company undertook to supply these omissions by an amendment of the petition filed in the circuit court long after the case had proceeded to judgment in the state court. But that is not permissible. Crehore vs. Ohio & Mississippi Railway Company, 131 U. S. 240. The state court has a duty to perform, which is to proceed with the case unless the record upon which it is asked to surrender its jurisdiction shows on its face, and at the time, a removable case. Crehore vs. Ohio & Mississippi Railway Company, 131 U. S. 240.

The learned circuit judge says, in his opinion, that "it does appear from the ruling of this court on the first petition for removal, which was made a part of the record in the state court, that it was then admitted by both plaintiff and defendant that Boyer and Hickey were citizens of Kentucky" (Rec. 47). The opinion thus referred to (Rec. 14) was "filed," it is true, but it was not a part of the record, nor does it state an admission that the individual defendants or any of them were citizens of Kentucky at the commencement of the suit. But supposing that difficulty to be out of the way, there was no showing to the state court of the citizenship of either of the individual defendants at the time of filing the second petition for removal.

(b) The petition alleged no *facts* to show that the

individual defendants had been fraudulently or improperly joined. It is like the reply in Wood vs. Carpenter, 101 U. S. 135, 143, of which this court said: "It contains some vigorous declamation, but is wanting in the averments of facts, which are indispensable to give it sufficiency as a pleading." This court has often applied the familiar rule that where fraud is relied on it is not sufficient to make the charge in general terms, but that the ultimate facts constituting the fraud must be alleged, and that the use of offensive adjectives does not supply the want of allegations of fact. Van Weel vs. Winston, 115 U. S. 228, 237; Ambler vs. Choteau, 107 U. S. 586, 591; Fogg vs. Blair, 139 U. S. 118, 127.

While it is true that the determination of issues of fact arising on a petition for removal is for the federal court and not for the state court, the latter is not required to surrender its jurisdiction upon a petition which merely calls names without alleging facts.

3. The evidence did not justify the conclusion that the individual defendants had been joined fraudulently or improperly.

Under this head the main difficulty is in apprehending what the counsel for the Railway Company conceives to be the precise "fraud," of which the plaintiff is supposed to have been guilty.

It is not pretended that the plaintiff did not have a cause of action against the individual defendants, or that he joined them collusively. The judgment which he has recovered against the company in the state court presupposes the negligence of the individuals who were its employes; otherwise it would not be liable.

The "fraud" in the view of the circuit court, seems to have consisted in dismissing the individual defendants, or rather in the inference deduced therefrom that the

plaintiff's motive in joining them originally was to prevent the Railway Company from removing the case. But one's motives for doing that which he has a right to do are not imputable. The nearest the learned circuit judge got to defining the plaintiff's "fraud" was to say that he had "no purpose of ever pushing the case to judgment against the individual defendants." But is it a fraud within the contemplation of law for a plaintiff who has a real claim against several defendants, as much against one as against the others but with a right of only one satisfaction, to join them in strict accordance with the rules of procedure in one action, simply because he may have a "purpose" not to push the case to judgment against all? Such "purpose" could not be pleaded in bar or abatement of the action or be made the basis of a motion to dismiss it, and it does not become the subject of legal cognizance or constitute fraud in law simply because it happens to interfere with the power of a defendant to comply with the conditions of the federal statute for removal. Congress has prescribed those conditions and they can not be evaded or enlarged by imputing fraud to a plaintiff who merely exercises a strictly legal right.

But assuming that the plaintiff's "purpose" not to push the case to judgment against the individual defendants is open to inquiry, and if established constitutes a "fraud," of which the Railway Company may complain in law, the circuit court's conclusion of fact was not justified by the evidence.

The circuit court instead of observing the rule which declares that fraud shall not be presumed or lightly imputed, took the position that an original purpose not to push the cases to judgment against the individuals was to be inferred from their subsequent dismissal,

in the absence of a satisfactory explanation of that act. But the subsequent dismissal of one or more of several defendants is entirely consistent with an original purpose to push the case to judgment against all. And where a course of conduct is consistent with an honest and lawful purpose fraud can not be inferred from it.

In this case the plaintiff was obliged to dismiss as to Hickey in order to secure a trial at that term, under the following provision of Carroll's Kentucky Code (1895).

Sec. 363. Ordinary actions shall stand for trial at the first term after process has been served on the defendant, as specified in section one hundred and two. An action upon contract, wherein the summons has been served in due time, as provided in section one hundred and two, upon part only of the defendants, shall stand for trial at the first term as to those so summoned, and may be continued as to the others for further proceedings. In other ordinary actions, the plaintiff can only demand a trial at any term as to part of the defendants upon his discontinuing his action on the first day of such term as to the others.

Under the decisions of the Court of Appeals of Kentucky it would have been error to have tried the case without discontinuing as to Hickey. Hedger vs. Downs, 2 Met. 160; Buckles vs. Lambert, 4 Met. 330.

The dismissal of Hickey was therefore essential to prevent a postponement of the trial, with all its attendant disadvantages, and is consequently accounted for on honest grounds.

But unless Hickey was improperly joined and dismissed the plaintiff's course with respect to Boyer and Evans worked no harm to the Railway Company, and is therefore immaterial; for Hickey was a citizen of Kentucky, and his presence as a defendant effectually prevented the Railway Company from removing the case,

without reference to the other defendants. But we can readily suppose that when the plaintiff found it necessary to dismiss Hickey, he deemed it expedient to dismiss Boyer and Evans also, in order to avoid the prejudice which an apparent discrimination against those two employes might arouse; or he may have required their evidence free from the entanglements which their continuance as responsible defendants imposed; or he may have feared the influence of their presence as defendants on the particular jury before which the case was to be called; or for one or more of a dozen reasons, entirely consistent with an original purpose to push the case to judgment against them, and having no connection with the Railway Company's desire to remove the case to the federal court, the plaintiff may have seen fit to dismiss the individual defendants; and in the face of an answer denying all fraud, and with the burden of proof upon the Railway Company, the plaintiff was not called upon to state to the circuit court his reasons for dismissing Boyer and Evans and Hickey, or either of them, as a condition of relieving himself from the presumption of fraud with which the court seems to have entered upon the hearing.

It appears from the record in the state court that the defendants had filed a motion to transfer the case. The motion itself is not in the record, but it is shown to have been overruled immediately upon the discontinuance of the case as to the individual defendants (Rec. 17). This motion may account for the discontinuance as to them. In Kenton county there are two places of holding court. The action was pending at Independence. The motion was evidently to transfer to Covington, based upon the ground that the defendants other than the Railway Company lived in Covington. That being so, they could prevent a trial at Inde-

pendence, under the following provision of the Statutes of Kentucky (Barbour & Carroll, 1894), while the Railway Company, being a foreign corporation, had no such right. The dismissal of the individual defendants removed the embarrassment, and may have been resorted to for that purpose.

Sec. 980. That in counties having a population of less than one hundred and fifty thousand, and which constitute separate judicial districts, the circuit courts shall be in continuous session, and shall be held in cities of the second class, where there are or may be such cities, but the judge of such courts shall hold part of such sessions at the county seat of the county where the same is not such city, such part to be not less than two weeks if the business of the court require so long, in February, June and October of each year. And all suits in which the defendants, or the greater number of defendants, reside nearer to said county seat than to said city of the second class, shall be docketed and tried at said county seat, and the process in such cases shall so indicate. Foreign corporations, non-residents of the county, and common carriers whose lines extend into any part of said (city or) county, shall be (deemed) residents of the places, and the plaintiff in any action against any defendant may select at which place he will have the case docketed and tried, and the process shall be made by the clerk to so indicate.

II.

The second petition for removal suggests that the dismissal of the individual defendants left the case for the first time one wholly between citizens of different states, and that the Railway Company's petition for removal filed immediately thereafter was therefore in time, independent of the considerations based on the alleged fraud of the plaintiff. But that theory was rejected by the circuit court, and properly. The act of Congress makes no provision for a petition for removal

under such circumstances, as is seen the moment we ask how soon after such dismissal must the remaining defendant file his petition for removal. The case is not a new case and the defendant is not required to file a new answer. But the only provision of the statute is for a petition for removal "at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff." The right of removal is statutory, and before a party can avail himself of it he must show that his case comes within some provision of the statute. Insurance Company vs. Pechner, 95 U. S. 183. There is no provision for the case supposed.

It was held under the act of 1875 that there was no provision for removal at the first term at which a trial could be had on the issues, as finally settled by amendment, but only at the first term at which the cause, as a cause, could be tried. Babbitt vs. Clark, 103 U. S. 606, 612; Phoenix Life Insurance Co. vs. Walrath, 117 U. S. 365; Edrington vs. Jefferson, 111 U. S. 770.

It must also be remembered that after the individual defendants were dismissed the Railway Company had a hearing and decision on its demurrer to the petition, before filing its second petition for removal. No statute has ever permitted a removal after the petitioner has had the benefit of a hearing on the merits, whether on demurrer or otherwise, in the state court. Alley vs. Nott, 111 U. S. 472; Scharff vs. Levy, 112 U. S. 711; Gregory vs. Hartley, 113 U. S. 742.

III.

It is true that where no objection is made in the circuit court on the ground that the petition for removal

has not been filed in time the question is not open on appeal. But at bar the objection that the second petition for removal was not filed in time was duly and promptly made in the circuit court (Rec. 27); and if it was well taken requires a reversal of the judgment of that court. In the very case cited by opposite counsel (Martin's Administrator vs. Baltimore & Ohio Railroad Co., 151 U. S. 673, 687), this court said:

"As the petition for the removal of this case into the Circuit Court of the United States was not filed in the state court within the time mentioned in the act of Congress, it would follow that, if a motion to remand upon that ground had been made promptly and denied, the judgment of the Circuit Court of the United States must have been reversed, with directions to remand the case to the state court. Edrington vs. Jefferson, 111 U. S. 770; Baltimore & Ohio Railway vs. Burns, 124 U. S. 165."

In Kansas City Railroad vs. Daughtry, 138 U. S. 298, one of the grounds of the petition for removal was that a co-defendant had been joined, as a nominal defendant, for the sole purpose of preventing the petitioner from removing the case into the United States court, but this court held that, because the petition for removal had not been filed at or before the time when the petitioner's answer was due, the state court was right in refusing to surrender its jurisdiction.

IV.

Since the decision below, Judges Taft and Lurton have held that, in a case like the present, employer and employe are not jointly liable, and that the employer may therefore remove on the ground of a separable controversy. Warrax vs. C. N. O. & T. P. Ry. Co., 72 Fed. Rep. 637; Hukill vs. M. & B. S. R. R. Co., 72 Fed. Rep. 745. The decisions are based upon the following cases

in which it is held that master and servant are not liable jointly for an injury occasioned by the negligence of the servant in the course of the master's business: Parsons vs. Winchell, 5 Cush. 592; Mulchey vs. Methodist Religious Society, 125 Mass. 487; Clark vs. Fry, 8 Ohio St. 358, 377; Campbell vs. Sugar Co. 62 Maine, 553; Beuttel vs. Railway Co., 26 Fed. 50; Page vs. Parker, 40 N. H. 47, 68; Bailey vs. Bussing, 37 Conn. 349, 351.

If this view be correct the joinder of the individual defendants did not affect the Railway Company's power of removal, and the whole argument in support of the decision below on the second petition for removal falls to the ground.

We respectfully submit that the circuit court erred in assuming jurisdiction upon the second petition for removal, and that its judgment should be reversed.

LAWRENCE MAXWELL, JR.

WM. GOEBEL,
ALFRED MACK,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

144.

JOHN T. POWERS,

Plaintiff in Error,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,

Defendant in Error.

The questions involved in these proceedings in error are new, but not difficult.

The principal question may be thus stated: Can a plaintiff, in a suit brought in a state court, by *fraudulent conduct* or device, prevent the filing, in proper time, of a petition, in the state court, for the removal of the cause to the federal court, and there be heard to object to the removal of the cause upon the sole ground that the petition for removal was not filed in proper time in the state court?

The Circuit Court, in its opinion overruling the motion to remand this case to the state court, clearly states the question involved in this case:

> "A plaintiff has a joint and several cause of action against a citizen of another state and citizens of his own state; he joins them in a single action in the state court for the sole purpose of preventing a removal by the non-resident to the federal court. After the statutory time for removal has passed, and the joinder of

the resident defendants has, as he thinks, effected his purpose, the plaintiff discontinues the case as to all but the non-resident defendant. Does this conduct estop the plaintiff from making the objection that the petition for removal, filed immediately after the discontinuance, is too late?" (Record, page 46).

We submit herewith a statement of facts, which is somewhat fuller than the statement submitted by plaintiff in error, and which, we think, will give the Court a better understanding of the facts, the plaintiff having omitted all reference to facts prior to September 7, 1893, although said facts appear in the Record.

STATEMENT OF CASE.

On the 14th day of April, 1893, John T. Powers, the plaintiff in error, brought a suit in the Kenton Circuit Court of Kentucky against the defendant in error and one David Evans, an employe of the defendant in error, to recover the sum of $25,000 for injuries alleged to have been sustained by him through the negligence of the defendants. The defendant in error was a corporation organized under the laws of Virginia and West Virginia, and the defendant Evans was a citizen of Virginia. The defendant in error, in proper time, filed its petition in the state court for the removal of the case to the United States Circuit Court for the District of Kentucky, upon the ground of diverse citizenship of parties plaintiff and defendant. The petition was accepted and the bond approved by the state court. In due time the defendant in error filed the transcript in the federal court.

The plaintiff in the case filed in the United States Court an answer to the petition for removal, controverting the allegations of diverse citizenship, and moved to remand the case to the state court. The motion to remand was

overruled. *Thereupon the plaintiff dismissed his suit.* (See Record, pages 32 to 44).

After the dismissal by the plaintiff of his suit in the United States Court, the plaintiff brought a second suit on the same cause of action in the Kenton Circuit Court of Kentucky, in which he joined as defendants the same parties he had sued in his first suit, and also W. D. Boyer and Edward Hickey, alleging in his petition that Boyer was a conductor, Evans an engineer and Hickey a switchman, in the employ of the defendant corporation; that the plaintiff was a switchman in the employ of the defendant corporation; and that while working as a switchman on the road of the defendant corporation the defendants, with gross and wanton negligence, ran a car upon the plaintiff, crushing his arm, so as to require amputation, to plaintiff's damage in the sum of $25,000.

The defendant corporation, *before its answer was due,* filed in the state court its petition for the removal of the cause to the United States Court, upon the ground of diverse citizenship of parties plaintiff and defendant, the existence of a separable controversy, and upon the ground that Boyer and Hickey had been made parties defendant, solely for the fraudulent purpose of preventing the removal of the cause to the federal court. The state court accepted the petition and approved the bond for removal, and in due time the transcript was filed in the United States Circuit Court for the District of Kentucky. The plaintiff filed in the federal court an answer, controverting the allegations of diverse citizenship, contained in the petition for removal, and denying that Boyer and Hickey had been fraudulently joined as defendants to defeat the removal of the cause to the federal court, and moved to remand the case to the state court. Upon trial of these issues the Court sustained the motion to remand the case to the state court, and the case was so remanded on January 10th, 1894. (Rec., p. 7).

After the case was remanded to the state court, to-wit, on February 6th, 1894, the defendant corporation filed in the state court, its answer, controverting all the allegations of negligence, contained in plaintiff's petition, and pleaded contributory negligence upon the part of the plaintiff, and plea of limitation. (Rec., pages 15 and 16). On the 16th day of October, 1894, the plaintiff replied to the pleas of contributory negligence and limitation, controverting same. (Rec., p. 19).

The cause was now at issue on October 16th, 1894, and *on the same day was called for trial.* On this day, *October 16, 1894,* the plaintiff, *upon his own motion, dismissed the case as to all the defendants in the case, except the Cheaspeake & Ohio Railway Company.*

Upon the dismissal of its co-defendants, the Chesapeake & Ohio Railway Company immediately (on October 16th, 1894,) filed another petition and bond for the removal of the case to the United States Circuit Court for the District of Kentucky, alleging the jurisdictional amount, the diverse citizenship of the parties plaintiff and defendant; that the cause was wholly between citizens of different states; that when the suit was originally brought the plaintiff had fraudulently and improperly joined as parties defendant citizens resident of the same state in which plaintiff resided, for the sole purpose of defeating the petitioner's right to remove the cause to the federal court; that because of such joinder the case was remanded to the state court; that after the case had been remanded and issues joined in the state court, the plaintiff had, upon his own motion, dismissed the suit as to all the defendants, except the petitioner; that the case on that date, October 16th, 1894, was for the first time a suit pending against the Chesapeake & Ohio Railway Company, alone, and praying the Court to order the removal, approve the bond, and proceed no further with the case. (Rec., pages 17, 18, 19).

The state court refused to approve the bond, but "not for insufficiency thereof." A jury was impanneled in the state court, and the case went to trial, resulting in a verdict against the defendant in the sum of $10,000. (Rec., p. 25).

On December 3d, 1894, the first day of the December Term, 1894, of the Circuit Court of the United States, the said term being the first term of said court after the filing in the state court of the petition for removal of the cause to the United States Circuit Court, the Chesapeake & Ohio Railway Company filed in said Circuit Court of the United States, a transcript of the record in the state court. (Rec., page 7).

On the 8th day of December, 1894, the plaintiff moved the Court to remand the case to the state court.

The grounds of the motion to remand were:

First. That the case was not removable from the state to the federal court.

Second. That the petition and bond were not filed within the time fixed by law for the filing thereof.

Third. That the question raised by the petition for the removal had theretofore been adjudicated by the United States Circuit Court, and such adjudication was relied on in bar to the last removal proceeding. (Rec., page 27).

The plaintiff filed answers to the petition for removal, but did not controvert the allegations of jurisdictional amount, and diverse citizenship of parties plantiff and defendant. (Rec., pages 28, 31). The only issue made was as to fraudulent conduct of plaintiff in state court, which prevented an earlier filing of the petition for removal in the state court. Two affidavits were filed (Rec., pages 26 and 27), and the transcript of the record in the first removal suit. (Rec., pages 32 to 43 inclusive). Upon the issue thus joined, the motion to remand was submitted, on the pleadings and evidence.

On January 7th, 1895, the Court overruled the motion

to remand, upon the ground that the plaintiff had, by fraudulent devices and conduct in the state court, prevented the defendant from filing his petition for the removal of the cause to the United States Circuit Court prior to the day on which it was filed, and that, therefore, the plaintiff was estopped from objecting to the time of its filing. (See opinion of Court, Rec., pages 43 to 54). The Court then approved the bond for removal which had been tendered by the defendant in the state court.

On December 9th, 1895, the plaintiff filed in the case a plea in abatement to the defendant's right to maintain the case in the United States Circuit Court.

The Chesapeake & Ohio Railway Company demurred to plaintiff's plea in abatement, which demurrer was sustained by the Court, the plaintiff excepting. The Court overruled the motion to defer proceedings. (Rec., pages 56 and 57).

On December 10th, 1895, the plaintiff renewed his motion to remand the case to the state court, which motion the Court overruled, the plaintiff excepting.

On February 14th, 1896, the case was called for trial in the Circuit Court of the United States for the District of Kentucky. The plaintiff still insisting upon his objection to the jurisdiction of the court, declined to recognize such jurisdiction or to prosecute his suit in said court, or to proceed further with said cause in said court, and the Court being of opinion that the plaintiff's petition did not state a good cause of action, adjudged that the action be dismissed at plaintiff's costs, to which ruling plaintiff excepted, and filed his petition for a writ of error to this court upon the ground alone that the case was not properly removed from the state court to the United States Circuit Court for the District of Kentucky, and that the United States Circuit Court for the District of Kentucky was without jurisdiction over said cause.

ARGUMENT.

A motion was filed by the defendant in error to dismiss the writ of error herein, upon the ground that no question of the jurisdiction of the Circuit Court of the United States is involved. A brief has been filed in support of that motion, so no further discussion of the motion will be attempted here.

In event that the Court should overrule the motion of the defendant in error to dismiss the writ of error, or in event the Court should desire an argument upon the whole cause, this brief is submitted, upon the question of the correctness of the rulings of the Circuit Court, in refusing to remand the case to the state court.

We submit it was the apparent purpose of the plaintiff in error to defeat, if possible, the right of the defendant in error to have the cause tried in the federal court. The dismissal of the first suit, after the Circuit Court had found that that case had been properly removed, evinces a determination upon the part of the plaintiff in error to prevent the trial of the case in the federal court. We do not question his right to have a dismissal of his case, if he so desired it, but we submit that the fact that he did dismiss is evidence of his purpose to deprive the defendant in error of a trial in the federal court.

Arrowsmith v. Nashville & Decatur R. R., 57 Fed. Rep., 165.

In the first suit only two defendants were before the Court—the defendant in error and David Evans. The record in the suit shows that the plaintiff thought that Evans was a citizen of Kentucky, as his answer, filed in the federal court, controverts the allegation of the petition for removal that Evans was a citizen of Virginia. Clearly, the plaintiff thought that that, by making Evans a party defendant, he had prevented the defendant from removing thecase.

Upon the discovery of the mistake, he has made as to the citizenship of Evans, to avoid trial in the federal court, he dismisses his suit. Another suit was brought in the state court, on the same cause of action. Parties, who *were not* deemed necessary parties defendant in the ffrst suit, were made parties defendant in the second suit. Both of these new parties defendant were citizens of Kentucky, the same state of which the plaintiff is a citizen. This making of new parties was clearly for the purpose of carrying into effect the plaintiff's object, to deprive the defendant corporation of its right of removal. A petition for removal was filed in the second suit, upon the grounds of diverse citizenship of parties plaintiff, and defendant corporation, and the existence of a separable controversy as to them, and upon the further grounds that the defendants, who were citizens of Kentucky, had been improperly and fraudulently joined as defendants, for the purpose of defeating the defendant corporation's right to remove the case to the United States Court. Upon a motion to remand, made in the Circuit Court, that Court held:

First. That there is no separable controversy in the case.

Second. That the plaintiff in the case had the right to join other defendants, if they were joined in good faith, even though the purpose of their joinder was to defeat the right of removal, and that there was no evidence to show a joinder of defendants for a fraudulent, or wrongful purpose. So the motion to remand was granted.

The case was remanded to the state court. The defendant filed its answer. The issues were joined in that court. The case was called for trial. The time when the defendant was required by the law of Kentucky to answer had long passed. The plaintiff evidently thought that as it was now too late to file a petition for the removal of the case to the federal court, the presence of other defendants in

the case was *no longer* necessary; the sole purpose of making them parties defendant was accomplished. The jurisdiction of the federal court was defeated, and so, *upon the day of trial*, the plaintiff, on his own motion, dismissed the cause as to all of the defendants, except the Chesapeake & Ohio Railway Company.

At this moment, for the first time, by the *action*, by the *election* of the plaintiff, the case *became a controversy wholly between citizens of different states.* The act of the plaintiff making the controversy one wholly between himself and the Chesapeake & Ohio Railway Company, made the case for the first time a removable case.

The right of removal was immediately exercised; a petition and bond for removal was immediately filed, the removal was refused, a transcript was filed in the United States Court, and a motion to remand was made.

In passing upon this motion to remand, the Court, after reviewing the decision granting the motion to remand on the first removal of the case, and affirming its opinion then rendered, says:

> "But the motive of the plaintiff in joining such defendants does become material, if he subsequently dismisses them, and makes the case before the final trial, one which would have been removable had it not been thus originally brought. If the Court can gather from the circumstances that the joinder and subsequent dismissal of the other defendants was a new device to defeat a removal by the non-resident within the statutory time, and with no purpose of ever pushing the case to judgment against the others we are very clear that the plaintiff ought not to be allowed to take advantage of a delay in removal which his own fraud has brought about, and that he must be estopped to use that delay as an objection." * * * *

"It is often within the power of a plaintiff to deprive a defendant of the right to go into the federal court by questionable means, which a want of comprehensiveness in the statute prevents the Court from defeating, but, as Mr. Justice Miller said in the Circuit, in the case of Arapahoe County v. Kansas Pacific Ry. Co. et al, in speaking of the constitutional right of persons, with requisite citizenship to resort to the federal courts and the necessity of preserving it, 'we must therefore be astute not to permit devices to become successful which are used for the very purpose of destroying that right.'

"The facts of the present case seem to us clearly to show that there was a device to deprive the Chesapeake & Ohio Railway Company of its constitutional and statutory right to come into this Court, and we find no difficulty in defeating the device on principles well supported by decided cases." (See Opinion Circuit Court, Rec., 43 to 54).

The evidence relating to the conduct of the plaintiff requires no elaboration. It can not be elaborated. It speaks for itself. It shows the exercise of the highest order of ingenuity in devising and carrying into effect an unlawful and fraudulent device to prevent the defendant in error from exercising its constitutional right to remove the case against it to the federal court for trial. There are no precedents clearly in point upon this case. Most probably, such proceedings, to prevent a removal, were never before attempted. It requires courage to father such a scheme.

It would be idle to attempt an improvement upon the very clear summing up of facts, and clear exposition of the law contained in the opinion of the Circuit Court. The question presents itself to this Court to be solved, by the acts of the plaintiff below. His acts must speak for them-

selves. His intentions and motives must be gathered from his acts.

It must, we submit, be clear to the Court that his whole proceedings in the state court was an ingenious unlawful device to prevent the removal of the cause to the federal court.

The defendants subsequently dismissed were not originally made parties defendant in good faith. The making them parties defendant was in bad faith for a fixed object, solely for the purpose of preventing a removal of the case to the federal court. Their subsequent dismissal shows this.

Can it be possible that a litigant can be deprived of a constitutional right by such scheming and practice? The question presents itself fairly. An earlier filing of the petition was prevented by the conduct of the plaintiff. Shall the plaintiff be permitted to plead and rely upon his fraudulent conduct to secure an advantage to himself?

Suppose a plaintiff, in a removable case, should by bodily violence prevent a defendant from filing in proper time, his petition for a removal of his suit to the federal court, would he be for a moment permitted to object to the removal upon the ground that the petition was not filed in time?

This Court has held in many cases, that objections to the time of filing of a petition for a removal to the United States Court out of time may be waived.

Ayers v. Watson, 113 U. S., 594.
Northern Pacific R. R. v. Austin, 135 U. S., 315.
Martin's Adm'r v. Balt. & O. R. R. Co., 151 U. S., 673.

It follows, we submit, that if objection to time may be waived by agreement, it may be waived by the conduct of parties. Indeed, in the cases of Ayers v. Watson and Mar-

tin's Adm'r. v. the Balt. & O. R. R. Co., above cited, the waiver of objection as to time of filing the petition, was altogether by the conduct of the parties in those cases. It is a well settled principle that the doctrine of estoppel may arise from the conduct of parties, and on no firmer foundation does the question of estoppel rest than upon the conduct of parties in waiving their rights and privileges. It is upon this principle of estoppel by conduct that the Circuit Court decided this question. In its opinion, the Court says:

> "On the whole, therefore, we conclude that the question is fairly before us, whether by the joinder by the plaintiff in the state court of resident defendants, against whom a good cause of action is stated, solely to prevent a removal by a non-resident defendant, and the subsequent dismissal of such resident defendants from the case, leaving the suit against the non-resident alone, estops plaintiff to plead the time of limitation against the removal." (Rec., p. 47).

We submit that no clearer case can be found for the application of the doctrine of estoppel than in the case under consideration. The national courts have been always vigilant in protecting the rights of litigants who seek their jurisdiction, in seeing that justice is meted out to all, and that unlawful devices to destroy the rights of litigants shall not be permitted.

In the case of Arrowsmith v. Nashville & Decatur R. R. Co., 57 Fed. Rep., 165, Judge Lurton, on a motion to remand, held:

> "The right to remove is a constitutional right, and while this Court should never seek to trench upon the jurisdiction of state courts, yet on the other hand it can not submit to see its jurisdiction defeated by so apparent a device as the joinder of a local defendant for

the purpose of depriving the only real defendant of the right of removal."

Mr. Justice Miller says, in the case of Arapahoe County v. Kansas Pac. Ry. Co., 4 Dillon, 277:

> "It would be a very dangerous doctrine, one utterly destructive of the rights which a man has to go into a federal court, on account of his citizenship, if a plaintiff in a case, instituting his suit, can, without right, reason or just cause, and with the express declaration that he asks no relief from them, join persons who have not the requisite citizenship, and thereby destroy the rights of parties in federal courts.
>
> "We must therefore be astute not to permit devices to become successful which are used for the very purpose of destroying that right."

In the cases last cited the plaintiff's pleadings showed that defendants had been made parties to the suit, merely for the purpose of defeating a removal of the cause to the federal court.

The decision of Mr. Justice Miller in the case of Arapahoe County v. R. Co. is cited approvingly by this Court in the case of Walden v. Skinner, 101 U. S., 577.

It has also been held in cases where citizen defendants have been joined with non-citizen defendants, thus making a case which would otherwise have been removable, a non-removable case; that *even though the petition may state a good, joint cause of action against all of the defendants*, yet the non-citizen defendant may file his petition for a removal, upon the ground that his co-defendants are not real defendants, but were joined for the *fraudulent purpose* of defeating his right of removal. Upon the filing of the transcript in the federal court, that court will hear and determine the question of the fraudulent joinder of defendants, and, if the

allegations of the petition for removal are sustained, will refuse to remand.

This was decided by the United States Circuit Court for the Southern District of Iowa in the case of Dow v. Bradstreet, 46 Fed. Rep., 824. In deciding this case Judge Shiras says:

> "A fraud of this nature, if successful, deprives the citizen of the right conferred upon him by the Constitution and laws of the United States, and certainly it must be that it can not be perpetrated without a remedy existing for its correction. Unless this be so, then it is possible to defeat in every instance the right of removal, when the same depends upon the citizenship of adverse parties, by the easy device of joining as a party one who has no interest in the case, but who is a citizen of the same state as the plaintiff."

The correctness of this holding has been recognized, if not expressly adjudicated, by this Court in

> Plymouth Mining Co. vs Amador Canal Co., 118 U. S., 264.
> Railroad v. Wangelin, 132 U. S., 599.
> See also Durkee v. Illinois Central R. R., 81 Fed. Rep., 1.

The above cases are cited to show that the national court will inquire into conduct of the plaintiff, in bringing his action in the state court, in order to ascertain his intention, and will be swift to defeat devices to deprive citizens of their right to have cases tried in tribunals which both the Constitution and laws of the United States open to them. In this case the petition for removal alleged the fraudulent joinder of parties defendant, for the purpose of defeating the right of removal. This allegation was controverted by answer filed in the federal court. Upon the

issue thus joined the Court heard evidence and determined that question in favor of the petitioner for removal, and as a result of that decision held that the plaintiff below was estopped by his fraudulent conduct from objecting that the petition for removal was not filed in proper time.

The issue of fraud was clear cut. Its determination was the decision of a question of fact, submitted to the Court by the parties. The Court, with the parties before it, with its knowledge of all the circumstances of the case, decided the question. We submit that the decision thus made is correct; it is sustained both by the law and the facts. We further submit that the judgment rendered by the Circuit Court upon such a hearing is not reviewable by this Court.

In considering the question of the application of estoppel by conduct in removal cases, this Court, in Northern Pacific Railway v. Austin, 135 U. S., while not expressly deciding the question, at least gives a very strong intimation of the rule which should govern such a case.

A suit has been brought to recover $475, making a controversy involving less than $500, the minimum amount that at that time authorized a removal. After the trial began, the Court permitted, over the objection of the defendant, an amendment to be filed, increasing the amount claimed to $1,000. A verdict and judgment was rendered for $750. No petition for removal was filed or offered in the state court, after the filing of the amendment, increasing the amount. Error was prosecuted to this Court, the error complained of being the filing of an amended petition, increasing the amount claimed. This Court dismissed the proceedings, holding, that as no petition for removal had been filed, this Court had no jurisdiction to review the ruling of the state court, permitting the amendment to be filed. After arriving at this conclusion, Chief Justice Miller adds:

"If the application had been made the question then would have arisen whether it came too late under the circumstances. The defendant was not entitled to remove the suit as originally brought before, or at the time at which said cause could be first tried, and before the trial thereof. But the objection to the removal depending upon the absence of jurisdictional amount was obviated by the amendment. As the time within which the removal must be applied for is not jurisdictional, but modal and formal. Ayres v. Watson, 113 U. S., 594, 598. It may, though obligatory, to a certain extent be waived; and as where a removal is effected, the party who obtains it is estopped upon the question of time, so, if the conduct of the plaintiff, in a given case, was merely a device to prevent a removal, it might be that the objection as to the time could not be raised by him.

"If, on the other hand, the motive of the plaintiff can not be inquired into, or, if admitted, would not affect the result, as in most cases, of Thompson v. Butler, 95 U. S., 694; Postal Telegraph Co. v. O'Connor, 128 U. S., 394, the defendant would simply suffer for want of comprehensiveness in the statute. The amendment here was held to have been properly allowed, and we have no power or disposition to interfere with the action of the Court in regard to it.

"The only importance it has is in its bearing upon the charge of bad faith in respect to the right of removal, and that question can not properly arise in the absence of an application for removal."

It must be conceded that the language of the Court in the above cited case is not an adjudication of the question involved in this case, but it must be held to be a very strong statement of the principles of law of estoppel which should control such questions.

II.

The correctness of the rulings of the lower court may be rested upon a broader basis than the question of waiver or estoppel, that is, that the Circuit Court was right in overruling the motion to remand the case to the state court, *because the petition for removal had been as a matter of fact and law filed in the state court in proper time.*

Before the answer was first due in the state court, a petition and bond for a removal of the case to the federal court was filed in the state court. The bond was approved, and in due time a transcript was filed in the United States Circuit Court. That court remanded the case to the state court, upon the ground that it was not a removable case, there being in the case no separable controversy between citizens of different states.

The judgment remanding the case to the state court was a final adjudication, *in this case*, of defendant's right of removal at that time. It follows, therefore, that at the time, when, under the law of Kentucky, the defendant was required to answer plaintiff's petition, the case was not a removable case, and that no petition of removal could at that time have been filed.

The Constitution guarantees the right to citizens of different states to have the controversies between them tried and decided in the federal courts. Congress, in prescribing the mode in which this constitutional privilege shall be exercised, requires that a petition for removal shall be filed in the state court

> "At the time, or any time before the defendant is required by the laws of the state or rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff."

By the express enactment of the statute only "the

party that is entitled to remove the suit" can file a petition for removal.

Of course, the case must be a removable case at the time the answer of the defendant is due, or a petition for a removal can not be filed. The law would never require so vain a thing to be done as the filing of a petition for a removal in a case that was not removable. Congress, in fixing the time within which a petition for a removal should be filed, clearly limited the requirements as to filing petitions to cases that were removable when defendant's answer was due, but behind the act of Congress, regulating the manner of removal, is the constitutional right of the citizen to have his case tried in a federal court. While Congress may regulate, it can not take away that right. We submit that it is only in cases where Congress has attempted to regulate, that the rule regulating applies.

A case between citizens of different states may not be, at its inception, a case that is removable under act of Congress, but the same may afterwards become a removable case.

Evans v. Dillingham, 43 Fed. Rep., 177.
Huskins v. Cincinnati Ry., 37 Fed. Rep., 504.
Northern Pac. Ry. v. Austin, 135 U. S., 315.

Can it be possible that Congress intended to prohibit the removal of such a case, by a requirement that the petition for removal should be filed before the case became a removable case?

To illustrate, suppose A, a citizen of Kentucky, sues B, a citizen of Ohio, in a state court of Kentucky to recover $500 for a breach of contract. Summons is served on B and on the day that his answer is due, under the law of Kentucky, he files his answer in the state court, controverting the allegations of the petition. The next day, by an amendment, B increases his demand and prays judgment

for $10,000. Clearly, when B's answer was due in the state court, the case was not removable. Just as clearly the increasing of the demand to $10,000 made the case a removable case. By the action of the plaintiff, the jurisdictional facts, of citizenship and amount, make the case a removable case. Can it possibly be claimed that the failure of B to file his petition for removal, when his answer was first due under the law of the state, deprives him of his constitutional right to have the removable case tried in the federal court.

In the case at ba plaintiff, resident of Kentucky, sues four joint tort feasors r $25,000; one of the defendants is a citizen of a different state from plaintiff. By reason of the joinder of the defendants the case is not removable. In due time the non-resident defendant files his answer. After the answer is filed and answer day has passed, the plaintiff dismisses the case as to all defendants, except the non-resident defendant. By this act of the plaintiff, the case is changed. A non-removable suit has become a suit of which the federal court might have had original jurisdiction. It has become a removable suit. Will the fact that the plaintiff has changed the suit into a removable suit, after the defendant has filed his answer, deprive the defendant of his right to remove the case?

The act of 1887 gives the right of removal where the diverse citizenship exists and the amount in controversy exceeds $2,000. These facts are jurisdictional. Without them no case is removable. With them every case, where a separable controversy exists, is removable. The subsequent clause relating to the manner of removal is not jurisdictional, but modal or directory. Can it be contended that when the method or mode of removal, which is applicable only to certain class of cases, and is not applicable to the exceptionable cases, can not be followed, that the right of removal is lost?

Would it not be carrying out the better spirit of the law to hold (when case that was not removable, when the answer was due, afterwards became, by the act of the plaintiff, a removable case), that a petition for removal filed as soon as the case becomes removable, is a substantial and effective compliance with the law regulating the filing of petitions for removal.

Any other construction of the law will make the act of Congress a trap, for taking unfair advantage of litigants.

In a case involving the principle contended for, the Circuit Court of the United States, for the Northern District of Texas, through Judge McCormack, says:

> "There is no question in my mind, where an amended petition makes a substantially different suit from the original petition, the limitation as to the time within which the petition for removal can be presented should relate to the new pleading. As an illustration of the propriety and necessity of so holding, take a case where a party sues in the state courts alleging the cause of controversy to be of less value or not of greater value than $2,000, and after the return time and after defendant has answered, the plaintiff files an amended petition, setting up the same cause of action, but claiming damages in a sum exceeding $2,000, can it be doubted that, if the state of the parties or the cause of action be such as to have given the right to remove, had the amount in controversy been sufficient to give this court jurisdiction, the defendant would not be denied his right to remove, because the time in which he was required to answer the original petition had passed. I am of opinion that the defendant's application for a removal was made in time, and the motion to remand will be refused."

Evans v. Dillingham, 43 Fed. Rep., 177.

To the same effect is the case of Huskins v. Cincinnati, New Orleans & Texas Pacific Railway Company, 37 Fed. Rep., 504.

The principle is recognized in the case of the Northern Pacific Ry. Co. v. Austin, 135 U. S., 315, cited and fully quoted on pages 15-16 of this brief.

If the principle contended for be wrong, then it is possible to defeat, in every instance, the right of removal, when the same depends upon the citizenship of the parties, by the easy devices of bringing suits for amounts less than will authorize a removal, and after answer has been filed, increasing the amount sued for to any sum the plaintiff may desire; or by joining in the suits defendants citizens of the same state with the plaintiff, without the intention of prosecuting the suit as to them, but with the intention of dismissing them from the suit as soon as the defendant, who is not a citizen of the state, has filed his answer.

We respectfully submit that every citizen who is entitled to remove a case from a state to a federal court is entitled to file his petition for removal *after the case has become a removable case*, and that the reasonable construction to be given to the act of Congress is that the petition for removal must be filed, when the defendant is required to *answer a removable case*.

The petition that we contend for is sustained by strong authority. In the case of Yarde v. Baltimore & Ohio R. R. Co. (57th Fed. Rep., page 913), a suit was brought in the state court of Indiana to recover against the defendant corporation for personal injuries. The prayer of the petition was, "By reason of the premises the said widow and children have been damaged in the sum of ——— thousand dollars. Wherefore the plaintiff demands judgment for ——— thousand dollars." The plaintiff was a citizen of Indiana. The defendant was a corporation under the laws of another state. A petition for removal was filed, upon

the ground that the controversy existed wholly between citizens of different states, and that the amount sued for exceeded $2,000. The defendant claimed that as the statute of Indiana provided for the recovery of $10,000 for a wrongful killing, that where the amount in a petition was left blank, the words "ten thousand" should be read into the petition. The state court granted the removal. The transcript was filed in the United States Circuit Court for the District of Indiana. The motion was made to remand upon the ground that the amount in controversy did not exceed $2,000. The Court held that under the allegation of the petition only $1,000 could be recovered, and the motion to remand was granted. In the rendition of its opinion the Court says:

> "It is urged that the motion to remand should be denied, because it is said that it is apparent that the blank space in the complaint was left unfilled simply as a device to prevent the removal of the cause to the federal court. It is due to the attorneys for the plaintiff to say that they explicitly disclaim any such motive. It is not material to the determination of the motion whether the omission was the result of oversight, or arose from a desire to defeat the right of removal. The right of removal is secured by the Constitution and laws of the United States, whenever the requisite diversity of citizenship exists, and matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000. This right can not be defeated by any artifice, evasion or omission. *If at any time during the progress of an action in a state court by amendment or otherwise a cause of action not before removable is changed or converted into one which is properly removable, the defendant, whether an alien or citizen of another state than that of which the plaintiff is a citizen,*

*has the right to file his petition and bond and secure a removal of the cause into the proper federal court.** It has often been held that if the defendant has a right to the removal, he can not be deprived of it by the allowance by the state court of an amendment reducing the sum claimed after the right of removal is complete. Kanouse v. Martin, 15 How., 198. The converse of this proposition must be true, that a defendant not entitled to removal, who becomes entitled to it by reason of an amendment of the complaint allowed by the state court, may remove the cause, although the time has elapsed within which his removal of the cause ought to have been asked for, if he promptly files his petition and bond after such amendment has been made. Huskins v. Railway Co., 37 Fed. Rep., 504; Evans v. Dillingham, 43 Fed. Rep., 177, 180."

In the case of Cookerly v. the Great Northern Ry. Co. et al, reported in 70th Fed. Rep., page 277, the plaintiff brought suit against three defendants to recover for the killing of his decedent, through the alleged negligence of the defendants. A suit was brought against the Great Northern Railway Company, the firm of Shepard & Seims and the firm of McKenzie & Glenn. Summons was not served upon Shepard & Seims, who were non-residents of the state. The other defendants joined issue by denying their liability. McKenzie & Glenn were citizens of the state of Washington and the Great Northern Railway a corporation incorporated under the laws of Minnesota. The case was brought to trial in the state court, and after plaintiff's evidence had been introduced a non-suit was granted as to McKenzie & Glenn. The plaintiff then asked leave to file an amended petition against all the defendants. The Court refused to permit the amended petition to be filed as

* Italics ours.

against McKenzie & Glenn, but permitted it to be filed as against the Great Northern Railway Company. The time for answer had long since passed and the case had gone to trial. Immediately upon the filing of the amended complaint against the Great Northern Railway, that company filed its petition for the removal of the case to the United States Court, upon the ground that the controversy for the first time existed between themselves and the plaintiff; that the amount in dispute exceeded $2,000, and alleging diverse citizenship between plaintiff and themselves. An order was made granting said petition of removal, and the transcript was filed in the United States Court. A motion was made in the United States Court to remand the case to the state court, upon the ground that the petition for removal was filed too late. That Court held that the suit as originally brought was not a removable suit by the railway company; that the discontinuance of the case as to McKenzie & Glenn made the case for the first time a removable case, which entitled the remaining defendants to exercise the right of removal, and based its decision distinctly upon the ground that the joinder of the other defendants had prevented the railway company from removing the case before that time.

The Court says:

> "The Great Northern Railway Company having been prevented from exercising its right of removal at an earlier stage of the proceedings by the disability imposed upon it by the plaintiffs in joining McKenzie & Glenn as co-defendants, I hold that this petition for removal was in time, it being in fact presented to the Superior Court before the expiration of the time limited for answering the amended complaint."

Cookerly v. Great Northern Ry. Co., 70th Fed. Rep., 277.

See, also, Mattoon v. Reynolds, 62 Fed. Rep., 417.

In the case of Yulee v. Vose, 99 U. S., 539, the same principle was decided. The case came to this court in error to the Court of Appeals of the State of New York. Yulee, a citizen of Florida, had been sued with other defendants, by Vose, a citizen of New York, in the courts of the state of New York, and the defendants with whom he had been joined were then citizens of the state of New York. If there had been no other defendants but Yulee, he could have removed the case to the Circuit Court of the United States. His joinder with the other defendants, however, prevented the removal; as the case then stood, it was impossible for him to procure a removal when the suit was brought. When the case was tried, it was held that there could be no relief as against any of the defendants, except Yulee.

Thereupon the complaint was dismissed as to all of the defendants, except Yulee. Yulee then filed his petition and bond for removal to the United States Court, upon the ground of diverse citizenship, which was refused by the state court, and *the trial proceeded*, resulting in a verdict by order of the Court against Yulee for $168,589.30, for which judgment was rendered. Exceptions to the ruling were duly taken. Upon this state of the record, the case was taken by proper proceedings to the Court of Appeals of New York, where the judgment was affirmed, upon the ground that the suit was not removable, under the act of 1866, when the petition for removal was filed. The ruling of the Court of Appeals came to this Court for review on error. This Court, after reviewing the facts, held that the petition for removal was filed in time, and that the case was removable. The Court says:

> "Here the party, otherwise entitled to remove, is embarrassed by the presence of those whom he can not control. In view of this the time of making his election

is extended until he is brought to trial, and it is not in conflict with the Pechner case to say that he may avail himself of his relief from the obligations of his defendants with the other defendants whenever that occurs, if before trial or final hearing as to him.

"When application for the removal was made, it appeared upon the face of the record, that Yulee, a citizen of Florida, had been sued, with other defendants, by Vose, a citizen of New York, and part of the other defendants, with whom he had been joined, were citizens of the state of New York. It also appeared that the controversy, so far as it concerned him, not only could be, but actually had been, by judicial determination, separated from the other dofendants. This, as we think, gave Yulee the right to transfer his part of the suit to the Circuit Court, and required the state court to proceed no further. Inasmuch as the Court of Appeals has sustained the judgment, refusing to permit the transfer to be made, the judgment of the Court of Appeals is reversed, and the cause is remanded for such further action, in accordance with this opinion, as may be necessary."

Yulee v. Vose, 99th U. S., 539.

It is true that the case of Yulee v. Vose was brought under the act that permitted a petition for removal to be filed at any time before the trial of the case, but the trial had actually taken place, so as to determine that certain parties to the suit were not liable, and although the issues had been made up by Yulee, and trial as to him had been commenced; yet upon the change of the character of the suit, his right to file a petition for removal immediately vested in him. The case, we submit, is clearly in point with the case at bar. In this case, the suit, as originally filed, did not present a removable case, nor did

the case become removable until, by the action of the plaintiff, the co-defendants of the Chesapeake & Ohio Railway Company were dismissed. Then, for the first time, the right of the Chesapeake & Ohio Ry. Co. to remove the case became an existing right; then, and not until then, could it elect as to whether or not it would remove or try in the state court. We contend, that under the decisions cited, the right of removal became vested, when its co-defendants were dismissed, and that the petition for removal filed immediately upon the accruing of that right carried with it the right of removal.

III.

Since the preparation of the foregoing brief, we have been handed the brief of the plaintiff in error herein.

Our learned adversary has undertaken to discuss the question of the *correctness of the finding of facts* of the Circuit Court, upon which the Circuit Court based its judgment, refusing to remand. As we said, in our brief to dismiss the proceedings in error herein, the decision of the Circuit Court, upon these questions of fact, is not reviewable by this Court. If there was error in the decision, it is reviewable only by the Circuit Court of Appeals, upon a bill of exceptions and proceedings in error to that Court.

We submit, however, that the Circuit Court was right in the conclusions of facts reached by it. It is not our purpose to review this evidence at length. We cite the Court to the first proceeding of removal herein, and the dismissal of the plaintiff's case, after the Court had refused to remand the case: to the action of the plaintiff in the state court in making parties defendant against whom he never intended to prosecute his case, who were, *presumptively, financially irresponsible;* the dismissal of these parties after it was thought that the right of removal had been lost; to the affidavits of

Boyer and Evans that were submitted to the Court. This evidence was all considered by the Court, with the parties before the Court, upon the issue joined as to the fraudulent conduct of the plaintiff. Upon an issue thus made, we do not think this Court will hold that the Circuit Court committed error in holding that the conduct of the plaintiff in the state court evidenced a fraudulent device to prevent the removal of the case to the Circuit Court of the United States.

We submit, also, that this case is not controlled by the case of Kansas City, etc., Railroad v. Daugherty, 138 U. S., 298. The cases present distinct questions. In the Daugherty case, under the allegations of the petition filed for removal, the case was removable at the time that the defendant was required to plead in the state court. In the case at bar, under the decisions of the Circuit Court, the case was not a removable case, when the defendant was required to plead in the state court. In the Daugherty case, after the defendant's co-defendants had been dismissed from the case, the defendant made no effort to remove the case upon the ground that then, for the first time, the case had become a removable case. In the case at bar, the right of removal was immediately exercised upon the case becoming a controversy wholly between citizens of different states.

A point is also made in the brief of our adversary that the Court erred in permitting an amendment to the petition for removal to be filed in the Circuit Court of the United States.

In the case of Carson v. Dunham, 121 U. S., 421, it was decided that if the jurisdictional facts were shown in the record to justify a removal, an amendment to the petition might be allowed, in the Circuit Court, for the purpose of stating more perfectly the grounds for removal.

See, also, Johnson v. Mfg. Co., 76 Fed. Rep., 616.

In the case at bar, the record submitted to the Circuit Court did show fully all the jurisdictional facts necessary to authorize a removal of the case—first, that the controversy existed wholly between citizens of different states, and secondly, that the amount in dispute exceeded $2,000. This case is distinguishable from the case of Crehore v. Ohio & Miss. Ry., 131 U. S., 240, cited by plaintiff in error. In the cited case the petition for removal failed to allege the *jurisdictional facts* which permitted a removal, and they did not appear elsewhere in the record. In the case at bar, these facts fully appear in the record. The amended petition for removal offered in the Circuit Court shows that when the other defendants were dismissed in the state court, the attorneys for the Chesapeake & Ohio Railway Company were required *speedily* to prepare their petition for removal; that in the haste of the preparing of this petition they misnamed one of the defendants, and that they failed to state that the parties, who *had been dismissed from the case* in the state court, were citizens of the state of Kentucky, and it was to correct this clerical omission that the amended petition was offered. The record, however, clearly showed that both Boyer and Evans were citizens of the state of Kentucky at the time of the filing of the suit (Rec., pp. 14, 15), and that they had been dismissed from the case after the case had been called for trial in the state court. All the jurisdictional facts, therefore, were presented to the Court in the record; the object of the amendment being simply to correct a clerical error, the Court properly, under the rulings of this Court, we submit, permitted the amendment to be filed. The amendment did not set out any jurisdictional facts, and we submit that it was not necessary in the petition for removal, to set up the citizenship of Boyer and Evans and Hickey, because Boyer and Evans and Hickey *at the time of filing the petition for removal were not parties to the suit;* the broad statement that they had

been made defendants for the purpose of preventing the removal of the case to the United States Court, was sufficient to enable that Court to hear testimony in relation to said allegation, and determine the question of fraud, raised by said allegation, without regard to their citizenship at that time.

There is a statement in the brief of the attorneys for the plaintiff in error likely to mislead the Court, to which we deem it important to call attention. The brief states that the defendant in error in the state court filed a demurrer to plaintiff's petition. There is no docket entry showing that such a demurrer was filed. In the *answer* filed by the defendant in error in the state court, there is an allegation that the petition does not state a cause of action against this defendant. That may be taken to be a demurrer, but, if so, it was a demurrer filed simultaneously with the filing of the answer of defendant, before the right of removal to the United States Court had accrued to the defendant. (Rec., p. 15). The filing of the demurrer, therefore, can not be used as an argument against the right of removal any more than was the filing of defendant's answer in the state court. Our contention is that the right of removal accrued for the first time after the filing of the answer.

Counsel for plaintiff in error cite to the Court the decisions of Judges Taft and Lurton, in the case of Warax v. the C., N. O. & T. P. Ry. Co., 72 Fed. Rep., and in the case of Hukill v. the M. & B. S. R. R. Co., 72 Fed. Rep., to the effect that a master and servant are not jointly liable for an injury that is occasioned by the negligence of a servant, and that therefore as there was, under these decisions, no joint liability of the defendant, at the time that their answer was required to be filed in the state court, their petition for removal should have been filed at that time. To this argument we have only to say that the record in this case shows that the defendant in error

did, before it was required under the law of the state of Kentucky to plead, filed its petition for the removal of the case to the Circuit Court of the United States; that said case was removed to the Circuit Court of the United States; that the Circuit Court of the United States held that, *in this case, there was a joint liability of the master and servant* for the negligent act of the servant, and that therefore the case was not a removable case. Whatever may be the effect of the decisions in the Warax case and the Hukill cases, we respectfully submit, that in *this case*, the decision of the Circuit Court, upon the question of joint liability is *res adjudicata*, and that it is not the subject of review, as counsel for plaintiff in error suggests. This Court has held, that the granting of an order to remand to the state court, a case that has been removed, is not reviewable, either by this Court or by the Circuit Court of Appeals.

Gurnee v. Patrick, 137 U. S., 141.
Birdseye v. Shaeffer, 140 U. S., 117.

Therefore, we respectfully submit, that so far *as this case* is concerned there was, at the time that the defendant in error was required to plead in the state court, a case of a joint liability, so adjudged by the Circuit Court of the United States; and that, that decision was binding upon the defendants in this case as to their right of removal, and that the decisions in the Warax case and in the Hukill case can not control the decision of the Circuit Court in this case.

We submit, that, both upon the doctrine of estoppel, which was followed by the Circuit Court, and upon the question that the petition for removal was filed in time, the judgment of the Circuit Court should be affirmed.

Respectfully submitted,

C. B. SIMRALL,
Attorney for Defendant in Error.

POWERS *v.* CHESAPEAKE AND OHIO RAILWAY COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

No. 144. Argued December 6, 7, 1897. — Decided January 10, 1898.

A judgment of the Circuit Court of the United States, against a party contending that that court has no jurisdiction because the case has not been duly removed from a state court, may be reviewed as to the question of jurisdiction by this court upon writ of error directly to that court under the act of March 3, 1891, c. 517, § 5.

An order of the Circuit Court of the United States, remanding a case to a state court, is not reviewable by this court.

An action brought in a state court, which, by reason of joinder as defendants of citizens of the same State as the plaintiff, is not a removable one under the act of Congress until after the time prescribed by statute or rule of court of the State for answering the declaration, may, upon a subsequent discontinuance in that court by the plaintiff against those defendants, making the action for the first time a removable one by reason of diverse citizenship of the parties, be removed into the Circuit Court of the United States by the defendant upon a petition filed immedi-

ately after such discontinuance, and before taking any other steps in defence of the action.

If sufficient grounds for the removal of a case into the Circuit Court of the United States are shown upon the face of the petition for removal and of the record of the state court, the petition for removal may be amended in the Circuit Court of the United States by stating more fully and distinctly the facts which support those grounds.

The right of a party to insist that a case has been duly removed into the Circuit Court of the United States is not lost or impaired by his making defence in the state court, after that court had denied his petition for removal.

This action was brought September 7, 1893, in an inferior court of the State of Kentucky, by Powers against the Chesapeake and Ohio Railway Company, as well as against Boyer, Evans and Hickey, the conductor, engineer and fireman of a railway train of the company, to recover damages for injuries suffered by the plaintiff from the running of the train against him by the negligence of the defendants. The summons was not served on Hickey, but was served on the other defendants.

The railway company, before its answer was required by the law of Kentucky to be filed, removed the case into the Circuit Court of the United States, upon a petition alleging that the matter in dispute exceeded, exclusive of interest and costs, the sum or value of $2000; that the railway company was a citizen of the States of Virginia and West Virginia only, and the plaintiff was a citizen of the State of Kentucky; that there was in this suit a separate controversy, which could be fully determined, as between them; and that the other defendants were fraudulently and improperly joined for the sole purpose of defeating the railway company's right of removal. In the Circuit Court of the United States, a transcript of the record of the proceedings in the state court was filed; and, after a hearing, a motion by the plaintiff to remand the case to the state court was sustained by an opinion filed and entered of record, which stated that the plaintiff was a citizen of Kentucky and the railway company a citizen of Virginia, and the other defendants were admitted to be citizens of Kentucky; and held that there was no separable con-

troversy between the railway company and the plaintiff; and the case was ordered to be remanded accordingly.

The railway company then filed in the state court a transcript of the proceedings in the Circuit Court of the United States; and an answer, containing a demurrer, and denying the facts alleged in the original petition, and alleging that the other defendants were fellow servants of the plaintiff. A year after the first petition for removal, and when the case was called for trial before a jury in the state court, the plaintiff discontinued his action against the individual defendants; the court overruled the demurrer; and the railway company filed a second petition for removal, like the first, except in alleging that in bringing this suit Evans and Hickey were fraudulently and improperly joined as defendants for the purpose of defeating the railway company's right of removal; that because of their joinder the cause had been remanded to the state court; and that the action, having now been discontinued as against them, was for the first time pending against the railway company alone. The state court denied the petition for removal, and the railway company excepted to the denial; the trial proceeded in that court, resulting in a verdict and judgment for the plaintiff; and the railway company appealed to the Court of Appeals of the State.

At the next term of the Circuit Court of the United States, the railway company filed a transcript of the record of the proceedings in the state court. The plaintiff moved to remand the case to the state court, upon the grounds, that it was not removable under the acts of Congress; that the second petition for removal was not filed within the time fixed by those acts; and that the question sought to be made by the second petition for removal had been already adjudged by the Circuit Court of the United States, and its former adjudication was a bar to the second proceeding for removal. The railway company (having filed affidavits showing that Boyer and Hickey were citizens of Kentucky, and that the discontinuance of the action as against the individual defendants was made by the plaintiff's attorney without their request or knowledge and without any consideration moving

from them) was permitted by the Circuit Court of the United States to amend its second petition for removal, by substituting therein the name of Boyer for that of Evans, in correction of a clerical mistake in the petition; and by alleging that Evans was a citizen of Virginia, and Boyer and Hickey were citizens of Kentucky, and that, by reason of the fraudulent and improper joinder of them to defeat the railway company's right of removal, the plaintiff was estopped to deny that the second petition for removal was not filed within the time required by law.

The Circuit Court of the United States, being of opinion that the plaintiff had fraudulently joined Boyer and Hickey as defendants in order to defeat the removal of the case to that court, and was therefore estopped to deny that the second petition for removal was filed in time, granted the petition for removal, and denied the motion to remand. 65 Fed. Rep. 129. The plaintiff then pleaded, in abatement of the cause in the Circuit Court of the United States, and to the jurisdiction of that court, the proceedings in the state court in which the railway company took part after the denial of its second petition for a removal, and its appeal to the Court of Appeals of the State; and, for the same reasons, moved the court to defer all proceedings until the termination of the case in the courts of the State, and in this court if the case should be brought here from the courts of Kentucky; and also moved to remand the cause to the state court. The Circuit Court of the United States sustained a demurrer to the plea, and denied the motions to defer and to remand.

The case was afterwards called for trial in the Circuit Court of the United States; and, the plaintiff insisting on his objection that the court was without jurisdiction, because the case had never been properly removed into that court, and declining for that reason to recognize the jurisdiction thereof or to prosecute his action therein, the court, overruling all the plaintiff's objections, and being of opinion that the original petition of the plaintiff did not state a cause of action, adjudged that the action be dismissed, and rendered final judgment for the defendant.

A writ of error from this court was sued out by the plaintiff, upon the sole ground that the cause was not properly removed into the Circuit Court of the United States and therefore that court was without jurisdiction. The court allowed the writ of error, and certified to this court the question, so presented, as a question of the jurisdiction of the Circuit Court, under the act of March 3, 1891, c. 517, § 5. 26 Stat. 827.

Mr. Lawrence Maxwell, Jr., for plaintiff in error. *Mr. William Goebel* and *Mr. Alfred Mack* were on his brief.

Mr. Charles B. Simrall for defendant in error.

Mr. Justice Gray, after stating the case, delivered the opinion of the court.

In the Circuit Court of the United States, the plaintiff contended that the court had no jurisdiction to entertain the case and to render the final judgment complained of, because the case had not been duly removed into the court from the state court in which it had been commenced.

The question thus presented was not, as in *Smith* v. *McKay*, 161 U. S. 355, whether a suit, of which the Circuit Court of the United States was admitted to have jurisdiction, was cognizable on the common law or on the equity side of the court; but the question was whether the Circuit Court of the United States had any jurisdiction whatever of the case. The jurisdiction of the Circuit Court of the United States was thus in issue, and the question of its jurisdiction having been duly certified, the case was rightly brought from the Circuit Court of the United States directly to this court, under the act of March 3, 1891, c. 517, § 5, upon the question of jurisdiction only. 26 Stat. 827.

The action was brought against a railroad company and several of its servants to recover for an injury alleged to have been caused to the plaintiff by the negligence of all the defendants. It is well settled that an action of tort, which

might have been brought against many persons or against any one or more of them, and which is brought in a state court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the Circuit Court of the United States, even if they file separate answers and set up different defences from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said, "A defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defence may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings." *Pirie* v. *Tvedt*, 115 U. S. 41, 43; *Sloane* v. *Anderson*, 117 U. S. 275; *Little* v. *Giles*, 118 U. S. 596, 600, 601; *Louisville & Nashville Railroad* v. *Wangelin*, 132 U. S. 599; *Torrence* v. *Shedd*, 144 U. S. 527, 530; *Connell* v. *Smiley*, 156 U. S. 335, 340. Applying this rule, the Circuit Court of the United States, when this case was first removed into that court, ordered it to be remanded. 65 Fed. Rep. 129, 130.

It is true that the same court, in similar cases between other parties, has since decided otherwise; and, upon a review of conflicting authorities, and referring to the distinction taken under the old system of special pleading between trespass and trespass on the case, has held that a master and servant cannot be joined in an action for a tort, and therefore the controversy between each of them and the plaintiff is a separate controversy. *Warax* v. *Cincinnati &c. Railway*, 72 Fed. Rep. 637; *Hukill* v. *Mansfield & Big Sandy Railroad*, 72 Fed. Rep. 745.

But it is unnecessary now to consider which of the views of the Circuit Court upon this question is the correct one, because that court, by its order remanding this case, distinctly and finally adjudged, as between these parties and for the purposes of this case, that, at the time of the filing of the first petition for removal, the case was not removable, because,

as it then stood, some of the defendants were citizens of the same State with the plaintiff, and there was no separate controversy between the plaintiff and the railway company, a citizen of a different State from himself. That order is not reviewable by this court. *Gurnee* v. *Patrick County*, 137 U. S. 141; *In re Pennsylvania Co.*, 137 U. S. 451; *Birdseye* v. *Schaeffer*, 140 U. S. 117; *Missouri Pacific Railway* v. *Fitzgerald*, 160 U. S. 556.

After the case had been so remanded, and when it was called for trial in the state court, the plaintiff discontinued his action against all the individual defendants, leaving it an action between citizens of different States; and the case then for the first time became one in its nature removable, and the single remaining defendant thereupon immediately filed a second petition for removal, which was denied by the state court, but was granted and an amendment thereof allowed by the Circuit Court of the United States. 65 Fed. Rep. 129.

The existence of diverse citizenship, or other equivalent condition of jurisdiction, is fundamental; the want of it will be taken notice of by the court of its own motion, and cannot be waived by either party. *Manchester &c. Railway* v. *Swan*, 111 U. S. 379. But the time of filing a petition for removal is not essential to the jurisdiction; the provision on that subject is, in the words of Mr. Justice Bradley, "but modal and formal," and a failure to comply with it may be the subject of waiver or estoppel. *Ayers* v. *Watson*, 113 U. S. 594, 597–599; *Northern Pacific Railroad* v. *Austin*, 135 U. S. 315, 318; *Martin* v. *Baltimore & Ohio Railroad*, 151 U. S. 673, 688–691; *Connell* v. *Smiley*, 156 U. S. 335.

Undoubtedly, when the case, as stated in the plaintiff's declaration, is a removable one, the defendant should file his petition for removal at or before the time when he is required by the law or practice of the State to make any defence whatever in its courts. *Edrington* v. *Jefferson*, 111 U. S. 770; *Baltimore & Ohio Railroad* v. *Burns*, 124 U. S. 165; *Kansas City &c. Railroad* v. *Daughtry*, 138 U. S. 298; *Martin* v. *Baltimore & Ohio Railroad*, 151 U. S. 673, 686, 687.

But it by no means follows, when the case does not become

in its nature a removable one until after the time mentioned in the act has expired, that it cannot be removed at all.

In *Northern Pacific Railroad* v. *Austin*, 135 U. S. 315, where a plaintiff suing in an inferior court of a State had laid his damages at less than the sum necessary to authorize a removal into the Circuit Court of the United States and was permitted at the trial to increase the *ad damnum* above that sum, and judgment of the district court was affirmed by the highest court of the State, a writ of error to that court was dismissed by this court, solely because no application for removal had been made after the allowance of the amendment; and the Chief Justice, in delivering the opinion, said: "If the application had been made, the question would then have arisen whether it came too late under the circumstances. The defendant was not entitled to remove the suit, as originally brought, 'before or at the term at which such cause could be first tried, and before the trial thereof.' But the objection to removal, depending upon the absence of the jurisdictional amount, was obviated by the amendment. As the time within which a removal must be applied for is not jurisdictional, but modal and formal, *Ayers* v. *Watson*, 113 U. S. 594, 598, it may, though obligatory to a certain extent, be waived; and as, where a removal is effected, the party who obtains it is estopped upon the question of the time, so, if the conduct of the plaintiff in a given case were merely a device to prevent a removal, it might be that the objection as to the time could not be raised by him." 135 U. S. 318.

The question whether a defendant may file, in the state court in which the suit was commenced, a petition for removal, after the time mentioned in the act of Congress has elapsed, in a case which was not removable when that time expired, is now directly presented for adjudication; and the answer to this question depends upon the terms and effect of the act in force when these proceedings took place.

In order to warrant a removal from a court of a State into a Circuit Court of the United States, according to the terms of that act, the necessary diverse citizenship or other foundation of the jurisdiction of the Circuit Court of the United States

must exist. It is only when that does exist, that "any party entitled to remove any suit" "may make and file a petition in such suit in such state court at the time, or at any time before the defendant is required by the laws of the State, or the rule of the state court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the Circuit Court to be held in the District where such suit is pending," and to give bond to file a copy of the record in that court "on the first day of its then next session." Act of March 3, 1887, c. 373, as corrected by act of August 13, 1888, c. 866; 25 Stat. 435.

This provision clearly manifests the intention of Congress that the petition for removal should be filed at the earliest possible opportunity. But, so long as there does not appear of record to be any removable controversy, no party can be entitled to remove it, and the provision of the act of Congress, that "any party entitled to remove any suit," "may make and file a petition for removal" at or before the time when he is required to make answer to the suit, cannot be literally applied. To construe that provision as restricting, to the time prescribed for answering the declaration, the removal of a case which is not a removable one at that time, would not only be inconsistent with the words of the statute; but it would utterly defeat all right of removal in many cases; as, for instance, whenever citizens of the same State as the plaintiff were joined as defendants through an honest mistake, not discovered by the plaintiff until after the time prescribed for answering; or whenever a personal injury was supposed, at the time of bringing an action therefor, to be a comparatively trifling one, which might be fully compensated by a sum much less than $2000, and was afterwards discovered to be so much graver, that there could be no doubt of the power and the duty of the court to allow an amendment increasing the *ad damnum*.

The reasonable construction of the act of Congress, and the only one which will prevent the right of removal, to which the statute declares the party to be entitled, from being defeated by circumstances wholly beyond his control, is to hold

that the incidental provision as to the time must, when necessary to carry out the purpose of the statute, yield to the principal enactment as to the right; and to consider the statute as, in intention and effect, permitting and requiring the defendant to file a petition for removal as soon as the action assumes the shape of a removable case in the court in which it was brought.

The result is that, when this plaintiff discontinued his action as against the individual defendants, the case for the first time became such a one as, by the express terms of the statute, the defendant railway company was entitled to remove; and therefore its petition for removal, filed immediately upon such discontinuance, was filed in due time.

A petition for removal, when presented to the state court, becomes part of the record of that court, and must doubtless show, taken in connection with the other matters on that record, the jurisdictional facts upon which the right of removal depends; because, if those facts are not made to appear upon the record of that court, it is not bound or authorized to surrender its jurisdiction, and if it does, the Circuit Court of the United States cannot allow an amendment of the petition, but must remand the case. *Crehore* v. *Ohio & Mississippi Railway*, 131 U. S. 240; *Jackson* v. *Allen*, 132 U. S. 27. But if, upon the face of the petition and of the whole record of the state court, sufficient grounds for removal are shown, the petition may be amended in the Circuit Court of the United States, by leave of that court, by stating more fully and distinctly the facts which support those grounds. *Carson* v. *Dunham*, 121 U. S. 421, 427; *Martin* v. *Baltimore & Ohio Railroad*, 151 U. S. 673, 690, 691.

In the case at bar, the second petition for removal, as presented to the state court, alleged that the petitioner was a citizen of the States of Virginia and West Virginia only, that the plaintiff was a citizen of the State of Kentucky, that Evans and Hickey had been fraudulently and improperly joined as defendants for the purpose of defeating the petitioner's right of removal, that because of their joinder the case had been remanded to the state court, and that the action,

having been discontinued against them, was now for the first time pending against the petitioner alone; and by the transcript, previously filed in the state court, of the record of the proceedings in the Circuit Court of the United States upon the first petition for removal, containing the opinion and order remanding the case, it appeared to have been admitted that the individual defendants were citizens of Kentucky.

It was thus made to appear, upon the record of the state court, that the case could not have been removed before, and that it had now become in its nature removable by reason of the diverse citizenship of the parties. Such being the case, it was rightly removed by the second petition for removal into the Circuit Court of the United States; and this petition was rightly permitted to be amended in that court.

The petition, as amended, distinctly alleged that Evans was a citizen of Virginia, that Boyer and Hickey were both citizens of Kentucky, and that by the discontinuance against them the action was for the first time pending against the railway company alone; and thus showed a case which the railway company was entitled to remove, independently of the allegations that these persons had been fraudulently joined as defendants to defeat the right of removal, and that the plaintiff was therefore estopped to deny that the second petition for removal was filed in time.

We do not find it necessary to pass upon the points of fraudulent joinder and of estoppel, made by the railway company, and upon which the Circuit Court of the United States proceeded in retaining jurisdiction of the case, because, for the reasons before stated, we are of opinion that, upon the true construction of the act of Congress, the petition, filed as soon as the case became a removable one, and before the railway company took any new steps in defence of the action, was seasonably filed; and that it sufficiently stated grounds for removal, and was therefore rightly permitted to be amended.

It is hardly necessary to add that the railway company, by making defence in the state court after that court had declined to surrender jurisdiction of the case, did not lose or

impair its right to insist that the case had been lawfully removed into the Circuit Court of the United States. The defendant, notwithstanding its objection, duly saved upon the record, to the jurisdiction of the state court, having been forced to a hearing in that court, is entitled to have the error in this respect corrected in any court having jurisdiction for the purpose. *Removal Cases*, 100 U. S. 457, 475; *Edrington* v. *Jefferson*, 111 U. S. 770, 774.

Judgment affirmed.